Supreme Court, U.S.
FILED

CASE NO. 941550 FEB 13 1995

OFFICE OF THE CLERK

SUPREME COURT of the UNITED STATES

OCTOBER, 1994 TERM

CHALLONER MORSE McBRIDE,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

and

APPENDIX A

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ISSUE PRESENTED

WAS THE JUDGE WHO SIGNED THE SEARCH WARRANT A NEUTRAL AND DETACHED MAGISTRATE AS IS REQUIRED BY BOTH THE WISCONSIN AND UNITED STATES CONSTITUTIONS [THE FOURTH AMENDMENT] WHEN THE FACTS DEMONSTRATE THAT FOR OVER TWENTY MONTHS PRIOR TO THE ISSUANCE OF THE SEARCH WARRANT THE JUDGE HAD RECUSED HIMSELF FROM EVERY CASE THE DEFENDANT, WHO WAS A FEMALE ATTORNEY, HAD BEFORE THE JUDGE DUE TO THE FACT THAT THE DEFENDANT HAD COMPLAINED BOTH TO THE CHIEF JUDGE OF THE EIGHTH JUDICIAL DISTRICT AND THE WISCONSIN JUDICIAL COMMISSION CONCERNING THE JUDGE'S TREATMENT OF THE DEFENDANT AND HER FEMALE CLIENTS?

LIST OF PARTIES

The parties to the proceedings are the petitioner and the respondent.

The petitioner represents herself, pro se, although she did not at trial or at appeal to the Wisconsin Court of Appeals.

The respondent was represented by Attorney Matthew Frank, Wisconsin Attorney General's Office, Madison, WI at trial, and by Attorney David J. Becker, Wisconsin Attorney General's Office on appeal, both of Attorney General, James Doyle's office.

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APPENDIX 100

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1994

CHALLONER MORSE McBRIDE,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Challoner Morse McBride, petitioner, (hereinafter "the defendant") petitions this court, pro se, pursuant to Rule 12 of the Rules of Criminal Procedure, to review the decision of the Court of Appeals of Wisconsin (filed on September 7, 1994) (App. 103-19), and the decision of the Wisconsin Supreme Court not to accept her Petition for Review (dated November 16, 1994) (App. 101-02).

CONCISE STATEMENT OF JURISDICTION

The defendant's motion to suppress on this and other grounds was denied by the trial court. On appeal to the Wisconsin Court of Appeals, that court affirmed the decision of the trial court, holding that the defendant had failed to prove that the judge was actually biased against her (App. 103-19). The Wisconsin Supreme Court denied defendant's Petition for Review on November 16, 1994 (App. 101-02). No rehearing or extension of time has been granted.

The issue presented by this case is a question of first impression in the State of Wisconsin and in the entire United States. The defendant was a practicing attorney in Door County, Wisconsin at the time that a search warrant was issued for her law office. The only judge in Door County had made it a practice for over

twenty months prior to the issuance of the search warrant to recuse himself from all cases involving her. This was a result of the defendant filing complaints concerning the judge's treatment of her and her female clients with the Chief Judge of the relevant Judicial District and with the Wisconsin Judicial Commission. The question presented for this court is whether, under these circumstances, the judge could function as the "neutral and detached" magistrate which the Constitution requires for the issuance of a valid search warrant.

This issue was first raised as a part of her suppression motion at trial court level (19:1-2; App. 149-51), has been litigated at the Wisconsin Court of Appeals (App. 103-19) and was prominent in her Petition for Review at the Wisconsin Supreme Court Level which was denied (App.

101-02).

The trial court determined that, when examined in the light of "high noon" (41:3; App. 125), Judge Koehn's issuance of a search warrant did not violate defendant's Fourth Amendment rights because ". . . there is no objective evidentiary basis to find that Judge Koehn's issuance of the search warrant for Attorney McBride's law office was an 'extreme' constitutional violation of the neutrality doctrine. Only if a magistrate's purported objectionable conduct is tantamount to a constitutional violation of due process is the neutrality doctrine violated. That did not occur here. There was no constitutional enervation of defendant's Fourth Amendment rights." (41:7; App. 133).

At the Wisconsin Court of Appeals, the same issue was decided, and that court

determined that Judge Koehn was a neutral and detached magistrate and that his constant self-disqualifications in defendant's cases (App. 113-15), as a reaction to her complaints to the Judicial Commission and others about his prejudice against her and her clients (App. 116-17), and her support of his opponents in the election (App. 115-16) were not enough to meet the defendant's burden of proving bias toward her by Judge Koehn (App. 117-19). The Court of Appeals summarized by saying, "[t]herefore,, because McBride has failed to demonstrate by a preponderance of the evidence that Judge Koehn was biased against her, we conclude that McBride's challenge to the search warrant must fail." (App. 118).

This issue presents a real and significant question of federal constitutional law. In addition, a

decision from this court would help to develop and clarify the law and, as the decision of the Court of Appeals demonstrates, this case calls for the application of a new doctrine, rather than the mere application of settled principles. The Court of Appeals' resolution of this issue is also in conflict with controlling decisions of the United States Supreme Court. This issue thus meets the criteria for review set forth in Rules 10, 11 and 14 and 28 U.S.C. § 2101(d).

PROCEDURAL STATUS OF THE CASE

On December 18, 1991, the defendant was charged by the filing of a criminal complaint with one count of theft by bailee as party to the crime contrary to Wis. Stat. 943.20(1)(b), and three counts of theft by fraud as party to the crime

contrary to Wis. Stat. 943.20(1)(d). (3:1-26).

A preliminary hearing was held on March 5, 1992 (94:1-204), at the conclusion of which the defendant was bound over for trial. An information (12) was filed, repeating the same four counts contained in the original criminal complaint, and on May 6, 1992 (95:1-32), the defendant was arraigned on the information.

On May 27, 1992, the defendant filed a motion to suppress physical evidence (19:1-2; App. 149-51). On June 10, 1992, the state filed a motion for a protective order to prevent the defendant from calling Judge John D. Koehn as a witness at the suppression hearing (25:1-2). After briefing and a hearing on the state's requested protective order, the trial court granted that request and

entered an order prohibiting the defendant from issuing a subpoena to or eliciting testimony from Judge Koehn (24:1-9; 26:1-5; 32:1).

On August 26, 1992, an evidentiary hearing (96:1-272) was held on the defendant's motion. The trial court's written decision denying the defendant's motion to suppress evidence was entered on December 15, 1992 (41:1-14; App. 120-48).

This case was tried to a jury of twelve in Circuit Court for Door County, with the jury picked from Brown County, the Honorable Philip M. Kirk presiding, on February 15-19, 1993 (98:1-1062). The defendant was convicted on all four counts and on May 20, 1993, was sentenced to concurrent terms of seven years in prison and a four-year sentence was imposed and stayed and the defendant was placed on probation for a period of three years

consecutive to the prison sentences.[1] In addition, restitution was ordered in the amount of $85,531 (99:1-90).

On December 1, 1993, a motion for postconviction relief pursuant to Wis. Stat. 974.02 and Rule 809.30 was filed with the Circuit Court for Door County (83:1-3). That motion challenged the restitution order and also requested relief based on the failure to instruct the jury that before the jury could answer "yes" to the question of whether the value of the property stolen was more than $2500 it must be satisfied of that fact beyond a reasonable doubt. On January 26, 1994, the trial court filed its written decision granting the defendant's motion with respect to the restitution and denying the

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[1] Defendant, J. Ronald McBride died of a heart attack on April 11, 1992, and Defendant, Challoner Morse McBride was left to face sentencing alone.

motion with respect to the failure to instruct the jury that it must determine value beyond a reasonable doubt (86:1-8). On February 1, 1994, the trial court's order granting in part and denying in part the defendant's motion for postconviction relief was entered (87:1).

The case was appealed to the Wisconsin Court of Appeals pursuant to a Notice of Appeal directed to the judgements of conviction and that portion of the trial court's order which denied the defendant's motion for postconviction relief (91:1). On September 7, 1994, the Wisconsin Court of Appeals issued its decision affirming the defendant's conviction (App. 103-19). That decision has been published as State v. McBride, 187 Wis.2d 408, 523 N.W. 2d 106 (1994). On November 16, 1994, the Wisconsin Supreme Court denied the

defendant's Petition for Review (dissented to by J. Abrahamson), leaving the Court of Appeals' decision to stand (App. 101-02). It is that decision of the Wisconsin Court of Appeals and denial of Petition for Review by the Wisconsin Supreme Court which the defendant is now appealing to the United States Supreme Court.

STATEMENT OF FACTS

Challoner Morse McBride, who was basically the only practicing female attorney in Door County, Wisconsin, was convicted of one count of theft by a bailee as party to the crime, contrary to Wis Stat. 943.20(1)(b), and three counts of theft by fraud as party to the crime, contrary to Wis. Stat. 943.20(1)(d).

Her convictions, and those of her husband, J. Ronald McBride, stem from the alleged theft of funds from Eulalia

Addison. Although the defendant maintains her innocence and maintained it at trial, she does not here challenge the sufficiency of the evidence to convict her. Therefore, an extended recitation of the facts adduced at trial will not be presented. Suffice it to say that the evidence demonstrated that Ms. McBride's husband, J. Ronald McBride (a non-attorney) befriended the elderly Mrs. Addison and, over the course of years, was found to have appropriated her funds without her knowledge.

Mr. McBride testified at the trial and denied that his wife was involved in this and, in fact, claimed that the monies at issue were gifts from Mrs. Addison to him, and that he told his wife that they were gifts (98:690-91). Challoner Morse

McBride DID testify at trial[2] and stated that she knew of some of the monies and had been told by her husband that they were gifts from Mrs. Addison (98:837-39, 875-77). Nevertheless, she was convicted, along with her husband, of the theft of the funds at issue.

The evidence was undisputed that Ms. McBride did not have any contact with Mrs. Addison related to the thefts and that she took no money directly from her. According to Mrs. Addison, she had not seen or been with Ms. McBride since 1984 (the time period of the alleged thefts was 1986-1991) (98:191). However, there was evidence that the defendant handled some of the checks at issue and, in fact, endorsed and deposited some of those

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[2] This is contrary to that which is stated in the Petition for Review (p. 7) to the Wisconsin Supreme Court. See 98:804-987.

checks and utilized the funds for personal and business expenses (98:276-512, 864, 868-872).

The issue presented by this case is whether Judge John D. Koehn, who signed the search warrant which allowed the search of the defendant's law office, was a "neutral and detached" magistrate, as is required by the Constitutions of both Wisconsin and the United States. The facts relevant to this issue were adduced at the hearing held on the defendant's suppression motion. That hearing took place on August 26, 1992 (96:1-272).

On June 3, 1991, Thomas J. Fassbender, a special agent with the Wisconsin Department of Justice, applied for a search warrant for the premises located at 306 South Third Avenue, Sturgeon Bay, Wisconsin known as the McBride Law Office. In both his

application and his oral testimony supporting the issuance of this warrant, Agent Fassbender stated that the prescribed premises contained documents and records related to work performed by the McBride Law Office and/or J. Ronald McBride for Eulalia I. Addison and the Eulalia I. Addison Foundation (E.I.A.F.). The application sought a warrant for those records, along with records of payments made by Eulalia I. Addison and all the financial records of the McBride Law Office.[3]

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[3] The search warrant and affidavit in support of the search warrant were admitted as Exhibit I at the suppression hearing on August 26, 1992. That exhibit is contained in record item 96B in the record. In addition, the transcript of the hearing at which the agents sought the search warrant was admitted at the suppression hearing as Exhibit J and is also included as an exhibit in item number 96B in the record. Apparently that transcript is also contained in the record as record item 92.

The agent's application for the search warrant was submitted to Door County Circuit Judge John D. Koehn. Judge Koehn was elected to the bench in late 1987 or early 1988 (96:16). Ms. McBride had supported Judge Koehn's opponent in the primary, Sven Kirkegaard, and another opponent, Peter C. Diltz, in the actual election (96:16). Immediately after Judge Koehn took office, Ms. McBride began to have problems with him (96:17). As a result of those problems, in September of 1988 and in January of 1989, Ms. McBride wrote letters to Judge Harold V. Froehlich, Chief Judge of the Eight Judicial District, outlining the continuing problems she was having with Judge Koehn in several of her cases. Specifically, Ms. McBride advised Judge Froehlich that she believed Judge Koehn was not treating her or her female clients

fairly (96:17-19; 96B: Exs. A & B; App. 154-81).

On August 31, 1989, Ms. McBride filed a formal complaint with the Wisconsin Judicial Commission concerning Judge Koehn's unfair treatment of her and her female clients (96:20; 96B: Exhibit C; App. 182-224). The Judicial Commission dismissed her complaint in December of 1989 (96:21; 96B: Ex. D).

On October 6, 1989, Ms. McBride received a telephone call from Judge Koehn's court reporter who informed her that Judge Koehn had recused himself from all of her cases before him (96:21-22). Since that date, Ms. McBride had not appeared before Judge Koehn in any adversarial proceedings, although Door County was a one-judge county, and she has appeared in almost 200 cases filed in Door County during that period of time (96:22).

Every time one of Ms. McBride's cases was assigned to Judge Koehn, he recused himself. The majority of applications for judicial assignments submitted by Judge Koehn note the reassignment as "self-disqualification" or "mandatory disqualification" (96:23). Ms. McBride never substituted on Judge Koehn after October 6, 1989, because he always recused himself immediately (96:23-24). Judge Kirk, in his written decision denying the defendant's suppression motion specifically found that "the authorization of this search warrant is the only time since the pattern of recusal began that Judge Koehn has not recused himself in a legal matter when Attorney McBride was involved" (41:2; App. 123).

Ms. McBride's testimony with regard to this issue was corroborated by William Sucha, Court Administrator of the Eighth

Judicial District. He testified that Judge Koehn disqualified himself from a "substantial number" of Ms. McBride's cases (96:171, 173). Admitted as Exhibit G at this hearing was a box filled with judicial assignment orders involving Judge Koehn (96:180-185). Exhibit G is contained in the record as part of item 96B.

In over 150 of the judicial assignment orders, Judge Koehn cited Wis. Stat. 757.19(1)(g) as his reason for recusing himself. This statute provides for self-disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

Judge Koehn heard Agent Fassbender's application for the search warrant on June 3, 1991, and authorized its issuance (92:1-29), although it is clear that even

he had some trouble with issuing the warrant against the defendant's law office records (96:26-29). The defendant's challenge to the search, which included, among others, a challenge to Judge Koehn's neutrality (App. 149-51), was denied by Judge Kirk in a written decision entered on December 15, 1992 (4i:1-14: App. 120-48).

Of critical importance to the United States Supreme Court's review of this issue is the fact that the defendant was prevented from calling Judge Koehn as a witness at the suppression hearing. Although the defendant intended to call the judge, the trial court granted the state's request for a protective order and prevented Ms. McBride from questioning the judge under oath as to his bias against her (25:1-2; 32:1).

The Wisconsin Court of Appeals

affirmed this issue (and another issue which is not being brought before the Supreme Court of the United States). The Court of Appeals held that it was the defendant's burden to prove by a preponderance of the evidence that the judge who signed the warrant was actually biased or prejudiced, and that the defendant had failed to meet that burden (App.1 103-19). The Supreme Court of Wisconsin denied the defendant's Petition for Review on both issues (App. 101-02).

ARGUMENT IN SUPPORT OF GRANTING REVIEW

THE UNITED STATES SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE ISSUE PRESENTED IS ONE OF FIRST IMPRESSION, NOT ONLY IN WISCONSIN, BUT IN THE UNITED STATES, AND PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL MAGNITUDE.

A. There are no decisions from Wisconsin or from this Court addressing the proper standard for determining whether a judge who signed a search warrant is "neutral and detached."

The protection offered to all of us by the Fourth Amendment requires that inferences which would support the issuance of search warrant "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1946). Although the Wisconsin Supreme Court has likewise acknowledged that a "search warrant may issue only on a finding of probable cause

by a neutral and detached magistrate," Ritacca v. Kenosha County Court, 91 Wis.2d 72,77, 280 N.W.2d 751 (1979), neither it nor the United States Supreme Court has ever delineated a test for measuring the neutrality or detachment of the magistrate.

The United States Supreme Court, however, has applied the requirement of "neutrality and detachment" in several different contexts to invalidate searches made pursuant to warrants.

In Coolidge v. New Hampshire, 403 U.S. 433 (1971), the Court invalidated a search warrant signed by the state attorney general who was acting as a justice of the peace. He was personally in charge of the murder investigation and later served as the chief prosecutor at the trial. The Court found "no escape from the conclusion that the seizure and

search . . . cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case," because "he was not the neutral and detached magistrate required by the constitution." Coolidge at 453. The Court quickly rejected the state's argument that the existence of probable cause cured the problem,[4] citing Agnello v. United States, 269 U.S. 20 (1925) and other cases for the proposition that prohibitions against unlawful searches and seizures are to be protected even if the same result might have been achieved in a lawful way. Coolidge at 450-51.

In Connally v. Georgia, 429 U.S. 245

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[4] In the case at bar, Judge Kirk questioned from the bench whether the fact that there was probable cause cured any problems of Judge Koehn's lack of neutrality or conflict (96:263). He obviously decided that it did.

(1977), the Court invalidated a search warrant issued by an unsalaried justice of the peace who received a fee of five dollars for every warrant he issued, but no fee for reviewing and denying a search warrant application.

In Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), it was the conduct of the justice who signed the warrant that violated the neutral and detached requirement. After issuing an open-ended warrant which allowed for the determination of whether certain items were obscene to be made during the search itself, the justice then participated in the search by making those obscenity determinations himself. The Court had no trouble concluding that the justice "did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application

for a search and seizure." Lo-Ji Sales at 326.

These cases define what is not "neutral and detached." However, no case from this Court truly defining what "neutral and detached" really means has been found by this defendant.

Courts from other jurisdictions have recognized that the issuing judge can have such a personal interest in the case under investigation so as to result in the loss of the required neutrality. For instance, the Oregon Court of Appeals invalidated a search warrant signed by a judge when the defendant was suspected of sexually assaulting the judge's clerk. State v. Burnam, 66 Or. App. 132, 672 P.2d 1366 (1983). Burnam only involved a question about a judge's concern for his clerk, not himself. In the case at bar, the problem is between the defendant and the judge,

himself, obviously a much more damaging situation to the defendant than in Burnam.

A federal case, United States v. Heffington, 952 F.2d 275 (9th Cir., 1991) scrutinized whether a federal judge, who had been a federal defender eight years prior for one of the defendants in a similar crime, could be a neutral and detached magistrate under the mandates of the Fourth Amendment and determined that he could. The Ninth Circuit stated that the "appearance clearly is not so 'extreme' that it constitutes a constitutional violation." In the case at bar, there is more than an "appearance of impartiality." Judge Koehn, himself, in over 200 cases, stated that he could not be impartial about Challoner Morse McBride.

The Heffington case also muses that "an appearance of partiality may lurk in

the fact that judges and police officers in rural counties often know more about the local criminal recidivists . . . than their more urban colleagues." Heffington at 279. However, this is not the fact in the case at bar. There is absolutely NO allegation that the defendant EVER engaged in any other criminality, had a prior record or was being surveilled concerning any other of her clients besides Mrs. Addison. Furthermore, the negative relationship between Judge Koehn and the defendant was far more enmeshed and personal and had far more potential for retaliation than in any of the cases cited in this brief. In contrast to the Wisconsin Court of Appeals' statement that "McBride's concern over Judge Koehn's impartiality is based solely on her conduct toward him," (Court of Appeals Decision:10; App. 119) the facts are clear

that she is complaining about HIS retaliatory and biased acts toward her: 200 recusals on all her cases for at least two years before he signed the search warrant for her law offices.

None of the decisions reviewed, however, have imposed on a defendant the burden of proving that the judge is actually biased against the defendant. In the case at bar, the Wisconsin Court of Appeals, in reliance on cases from other jurisdictions that dealt generally with the question of judicial bias, has interpreted the defendant's claim to require her to prove, by a preponderance of the evidence, that Judge Koehn was actually biased against her (App. 108-19). None of the cases relied on by the Court of Appeals were even remotely concerned with the "neutral and detached" language applicable in the context of a Fourth

Amendment claim.

The defendant recognizes that claims based merely on the issuing judge's prior acquaintance with the defendant or knowledge of the defendant's past record have properly been denied, State v. Mandravelis, 114 N.H. 634, 325 A.2d 794 (1974), but the facts of this case establish much more than Judge Koehn's simple acquaintance with Ms. McBride. At issue here is the neutrality of a judge who the defendant had vociferously complained about, as to his partiality with her and her female clients, both to the chief judge of the Eighth Judicial District and to the Wisconsin Judicial Commission (96B: Exs. A, B, and C; App. 154-224).

Judge Koehn, in response to those complaints, indicated his unwillingness to continue hearing cases in which the

defendant represented a litigant by uniformly disqualifying himself from each and every one of those cases. Exhibit G, which was introduced into evidence at the suppression hearing, and which contains hundreds of requests for judicial reassignment (96B) establishes without a doubt the Judge's inability to preside impartially over cases involving Ms. McBride as an attorney. How then was it proper for this judge to sit in judgement over the most important decision in the defendant's life, the request for a search warrant for her law office which eventually led to charging and convicting her of a crime she did not commit?

The defendant wants this Court to understand that no contention is made here that every warrant issued by a judge at odds with an attorney is invalid. Nor does the defendant contend that a mere

allegation of partiality requires a finding that the issuing magistrate was not neutral and detached. The facts here, however, add up to much more than a simple disagreement between a judge and a lawyer, and the defendant's claims are more than a mere allegation of partiality. Ms. McBride supported the judge's opponents in their campaigns for election, accused him of treating her and her clients unfairly, at least partially based on her sex, and formally referred him to the Wisconsin Judicial Commission on those same grounds. As a result, the only judge in this one-judge county refused to hear her cases and voluntarily recused himself from over 150 cases.

Contrary to the decision of the Wisconsin Court of Appeals, the defendant should not have to PROVE that Judge Koehn actually used this case to exact some type

of retribution, any more than the defendant in Burnam had to prove that the judge who signed the warrant to search his residence did so to exact revenge for his clerk. It is not the subjective motivation of the judge which is at issue, but the objective application of the facts which established that the judge's personal interest in the case went beyond that which is constitutionally acceptable. In the case at bar, the personal nature of the conflict between Judge Koehn and Challoner Morse McBride, objectively documented by her complaints against him and his response to those complaints, should have resulted in a finding that he was NOT the neutral and detached magistrate that Ms. McBride was entitled to have when the government sought permission to search her law office.

This court should grant review

because the issue presented is properly within its law-declaring function and presents an important constitutional issue of first impression.

B. It was fundamentally unfair to fault the defendant for failing to prove that Judge Koehn was actually biased against her when the trial court had precluded her from calling Judge Koehn as a witness at the suppression hearing.

This Court should also grant review in order to address the propriety of requiring a litigant to prove actual bias against her by a sitting judge, while at the same time preventing the litigant from calling that judge as a witness.

Ms. McBride intended to call Judge Koehn as a witness at the scheduled suppression hearing. The state, however, sought and obtained a protective order from the trial court, preventing her from doing do, on the theory that judges are

immune from questioning concerning their "mental processes" (24:1-9; 32:1).[5] The defendant submits to this Court that it cannot allow the decision of the Wisconsin Court of Appeals to stand without further review of this contradiction.

If the defendant is to be required to prove actual bias when challenging the neutrality of a judge who signs a search warrant, then it follows from that premise that the defendant must be allowed to question the judge, under oath, at the

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[5] Despite the fact that Judge Koehn was not allowed to testify, Judge Kirk quotes Judge Koehn, as if he had testified, in his decision: Judge Koehn did not know anything about the investigation before application was made to him; he did not initiate any investigation of Attorney McBride; he did not profit monetarily; he did not act as a law enforcement officer. (41:6; App. 130-31) No one else at the hearing testified to this information. Only Judge Koehn had this information. Obviously Judge Kirk discussed the matter with Judge Koehn.

suppression hearing. IF, however, the defendant is not to be permitted to so question a sitting judge, then it is neither fair nor logical to adopt a standard that requires proof of actual bias.

It is interesting to note that in Connally v. Georgia, 429 U.S. 245, a case in which the search warrant was declared invalid on the grounds that the issuing magistrate was not "neutral and detached," there was no requirement that the defendant establish actual bias on the part of the judge. Despite this fact, the court of appeals recited at length the testimony of the issuing magistrate at the suppression hearing. Connally at 246-47, n.3. Obviously Connally was allowed to subpoena and question the "mental process" of his issuing magistrate.

It would be ironic indeed to let

stand the decision of the Wisconsin Court of Appeals in this case, which faults the defendant for not proving actual bias of Judge Koehn, when the defendant was prevented by the state's motion and the trial court's ruling from presenting the evidence she needed to establish her claim!

C. This entire matter may well be a cover-up based on sexual discrimination and bias, from the issuing magistrate, to the trial judge, to the Wisconsin Court of Appeals, to the Wisconsin Supreme Court.

Except for Challoner Morse McBride, all of the actors in this entire matter are male: Judge John D. Koehn, Judge Philip M. Kirk,[6] Court of Appeals Justices

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[6] See footnote 5 as to Judge Kirk soliciting behind the scenes "testimony" from Judge Koehn which is NOT on the record anywhere. How on earth could the "facts" on page 5 of his Decision (41) about Judge Koehn be known by Judge Kirk, when they are not in the record, unless he

Myse, Cane, and LaRocque, and all the Wisconsin Supreme Court Justices (except Justice Abrahamson, who dissented from the denial of the Petition for Review, and one other Supreme Court Justice).

This defendant has vociferously proclaimed her innocence on any charges of defrauding or "stealing from" Mrs. Addison from the very beginning and continues to do so. Yet, because of her feminist attitude, her feminist practice of law and the very small, male-dominated community in which she lived, she has been convicted of a crime which she did not commit. This could only occur in a situation where the actors were all male and who all passed on a situation which was very near and dear to their hearts: a feminist attacking one of "their own" on the grounds that he did

---

talked to Judge Koehn about them?

not treat her or her female clients fairly.

If this matter is looked at in that light, it is not the light of "high noon" which Judge Kirk proclaims (41:3, App. 125), it is dim twilight and smacks strongly of a cover-up.

CONCLUSION

For all the reasons set forth above, the defendant, Challoner Morse McBride, respectfully requests that this court grant her Petition for Writ of Certiorari.

Respectfully submitted

Challoner Morse McBride

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INDEX

TO

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Filed

Office of the Clerk

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To: November 16, 1994

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You are hereby notified that the Court has entered the following order:

No. 94-0415-CR State v. McBride L.C. #91CF146

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Challoner Morse McBride, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, J., dissents.

Marilyn L. Graves

Clerk of Supreme Court

Filed Sept. 7. 1994

No. 94-0415-CR IN COURT OF APPEALS

STATE OF WISCONSIN DISTRICT III

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. DECISION

CHALLONER MORSE McBRIDE,
Defendant-Appellant.

APPEAL from a judgement and orders of the circuit court for Door County; PHILIP M. KIRK, Judge. Affirmed.

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE,J. Challoner Morse McBride appeals a judgement of conviction for one count of theft by a bailee as a party to the crime in violation of § 943.20(1)(b), Stats., and three counts of theft by fraud as a party to the crime under § 943.20(1)(d), an order denying her motion for the suppression of physical evidence and an order denying her motion for postconviction relief. McBride

contends that the evidence seized pursuant to the execution of the search warrant should be suppressed because the warrant was not issued by a neutral and detached magistrate as required by the United States and Wisconsin Constitutions. McBride further contends that the trial court committed reversible error when it failed to instruct the jury that the value of the items subject to the charge must be proven beyond a reasonable doubt. Because we conclude that the warrant was issued by a neutral and detached magistrate and that McBride waived her objection to the instruction involving proof of value beyond a reasonable doubt by failing to object either at the instructions conference or after the instructions were given, the judgement and the orders are affirmed.

The facts of this case are undisputed. Challoner Morse McBride, a practicing attorney in Door County, Wisconsin, was convicted of one count of being a party to

the crime of theft by a bailee under § 943(1)(b), Stats., and three counts of theft by fraud under § 943.20(1)(d). The convictions stemmed from the theft of funds from McBride's client, Eulalia I. Addison.

At the time of the conviction, Door County had a single branch of the circuit court presided over by Judge John Koehn. Thomas Fassbender, a special agent for the State Department of Justice, applied to Judge Koehn for a warrant to search McBride's law office. The warrant sought records and documents relating to alleged thefts by McBride from Eulalia I. Addison and the Eulalia I. Addison Foundation. Based upon a finding of probable cause, which is not challenged in this appeal, Judge Koehn signed the search warrant that resulted in the discovery of a series of documents and business records used to obtain the convictions of McBride.

McBride contends that Judge Koehn was

not a neutral and detached magistrate as required by the constitution because he harbored actual bias against her. McBride asserts that at the time of Judge Koehn's initial election, she was active in supporting Judge Koehn's opponent and that shortly after Judge Koehn took office she began to have problems with him. Based upon these problems, which included allegations of gender bias, McBride wrote letters to the chief judge of the eighth judicial district explaining the problems she was having with Judge Koehn. The record is silent as to any action taken by the chief judge. In addition to these letters, McBride filed a formal complaint against Judge Koehn with the Wisconsin Judicial Commission. The commission conducted an investigation and subsequently dismissed the complaint after finding that there was no probable cause to proceed further.

During the period the complaint was

pending, Judge Koehn's court reporter advised McBride that Judge Koehn intended to recuse himself from all cases in which McBride appeared as counsel. After Judge Koehn made this announcement, McBride appeared in hundreds of cases filed in Door County and Judge Koehn uniformly disqualified himself in each one of those cases. In over 150 of the judicial assignment orders submitted by Judge Koehn, he cited § 757.19(2)(g), Stats., as the basis for his disqualification. Section 757.19(2)(g) provides that a judge should disqualify himself if he "determines that, for any reason, he or she cannot or it appears that he or she cannot act in an impartial manner."

The State and McBride agree that the constitution requires that "inferences of probable cause be drawn by 'a neutral and detached magistrate'" before a search warrant may issue. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); see also State v.

DeSmidt, 155 Wis.2d 119, 131, 454 N.W.2d 780, 785 (1990) ("A search warrant may only issue on the basis of a finding of probable cause by a 'neutral and detached magistrate.'") If the issuing magistrate does not meet this constitutional mandate, the warrant is invalid. See Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

McBride contends that Judge Koehn was not a neutral and detached magistrate. In support of her contention, McBride cites three United States Supreme Court cases where the Court invalidated a search warrant on the ground that the issuing magistrate was not neutral and detached. A review of these three cases reveals that they are not dispositive of McBride's contention that Judge Koehn was not neutral and detached. In Coolidge, the Court held that the issuing magistrate was not neutral and detached because he was also the chief investigator and prosecutor on the case. Id. In Connally

v. Georgia, 429 U.S. 245, 246 (1977), the Court invalidated a search warrant on the ground that the justice of the peace was not neutral and detached because he received compensation for each warrant he issued. Finally, in Lo-Ji Sales Inc. v. New York, 442 U.S. 319, 326-27 (1979), the Court held that the issuing magistrate was not neutral and detached after he participated in the execution of the warrant. McBride's claim is wholly distinct from the claims made in Coolidge, Connally and Lo-Ji Sales.

McBride contends that Judge Koehn was not a neutral and detached magistrate because he harbored actual bias against her. This court has been unable to find a case that has dealt with this issue, and neither the State nor McBride has cited such a case. However, because McBride's claim centers on the question of whether Judge Koehn was impartial, we find those cases dealing with a defendant's constitutional right to an

impartial and unbiased judge to be instructive.

Whether Judge Koehn was a neutral and detached magistrate as mandated by the United States and Wisconsin Constitutions is a question of constitutional fact that we review de novo without deference to the trial court. State v. Ledger, 175 Wis.2d 116, 122, 499 N.W.2d 198, 200-01 (Ct. App. 1993). Furthermore, we note there is a presumption that a judge is free of bias and prejudice. See Ex Parte Twintech Indus., Inc., 558 So.2d 923, 926 (Ala. 1990); State v. Rossi, 741 P.2d 1223, 1225 (Ariz. 1987); Korolko v. Korolko, 803 S.W.2d 948, 950 (Ark. Ct. App. 1991). To overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence.[1] See Rossi, 741 P.2d at 1225. With

[1] The parties have not cited, nor has this court found, Wisconsin precedent that creates a presumption of judicial impartiality or establishes the burden of proof a party

this in mind, we now turn to the question of whether Judge Koehn was a neutral and detached magistrate.

In determining whether Judge Koehn was actually biased, we must evaluate the existence of bias in both a subjective and an objective light. See State v. Rochelt, 165 Wis.2d 373, 378-79, 477 N.W.2d 659, 661 (Ct. App. 1991). The subjective component is based on the judge's own determination of whether he will be able to act impartially. Id. In determining whether the subjective test is satisfied, it is only necessary to examine Judge Koehn's actions concerning the application for the search warrant. If Judge Koehn subjectively believed he would not be able to act impartially, he would have been

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must meet to prove judicial bias. Because we find it persuasive, we adopt the presumption of judicial impartiality used in other jurisdictions and conclude that a party must prove judicial bias by a preponderance of the evidence in order to overcome this presumption.

required to disqualify himself from hearing the application for the search warrant. Because he did not disqualify himself, we may presume that Judge Koehn believed himself capable of acting in an impartial manner and therefore, our inquiry into the subjective test is at an end. See id. However, the fact that Judge Koehn did not believe that he was subjectively biased does not end our inquiry.

Under the objective test, we must determine whether there any objective facts demonstrating that Judge Koehn was actually biased. See id. Under this test, the defendant must show that the "trial judge in fact treated him unfairly."[2] Id. Merely showing that there was an appearance of partiality or that the circumstances might

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[2] For example, in Connally v. Georgia, 429 U.S. 245 (1977), the United States Supreme Court determined that a justice of the peace was not impartial where he received compensation for each warrant that he issued.

lead one to speculate that the judge was partial is not sufficient. State v. Hollingsworth, 160 Wis.2d 883, 894, 467 N.W.2d 555, 560 (Ct. App. 1991).

Here McBride first contends that Judge Koehn's voluntary recusal in a large number of cases in which McBride appeared as attorney is proof of his prejudice. We do not agree. In the vast majority of cases in which Judge Koehn disqualified himself, he cited §757.19(2)(g), Stats., as the basis for disqualification. Under § 757.19(2)g), a judge must disqualify himself if he determines that he cannot act in an impartial manner or if there is an appearance that he is not impartial. Because Judge Koehn was required to disqualify himself if there would be the appearance of bias is not a sufficient basis upon which to make the constitutional challenge mounted here. See Hollingsworth, 160 Wis.2d at 894, 467 N.W.2d at 560. Therefore, in order for McBride's claim to

succeed, she must demonstrate that Judge Koehn was actually biased against her. We conclude that the evidence submitted by McBride is insufficient to show that Judge Koehn was actually biased against her.

While the record provides an ample basis for the judge's conclusion that there would be the appearance of partiality, it does not demonstrate that Judge Koehn was actually biased. There is nothing in the record to show that Judge Koehn acted unfairly when he issued the search warrant. In fact, the record shows quite the opposite. Prior to issuing the search warrant Judge Koehn made an inquiry into the scope of the warrant because he was concerned about the attorney-client privilege. The concern expressed by Judge Koehn before issuing the warrant demonstrates that he maintained the neutrality and impartiality his position demands. Furthermore, because McBride does not claim that Judge Koehn issued the

warrant without probable cause, there is no reason to believe he acted improperly or unfairly. Therefore, we conclude that Judge Koehn's decision to disqualify himself from cases involving McBride is not sufficient evidence of actual prejudice to conclude that Judge Koehn was not neutral and detached.

McBride next contends that Judge Koehn was biased against her because she supported his opponent in the election and because she lodged complaints against him for gender bias on two separate occasions. As to McBride's support of Judge Koehn's opponent, we note that in states using elections for their judicial selection process the bar will frequently be divided among the various contenders for the judicial position. If those who support the losing candidate are allowed to claim actual bias, a judge would be unnecessarily precluded from hearing a significant number of cases arising within his or her jurisdiction. Furthermore, judges

have an ethical obligation to treat attorneys impartially. SCR 60.01(3) (West 1990). This court is unwilling to conclude that Judge Koehn violated this ethical obligation solely because McBride did not support his candidacy. Therefore, we conclude that McBride's support of Judge Koehn's opponent, standing alone, is not sufficient evidence to allow this court to conclude that Judge Koehn harbored actual bias against her.

The two complaints lodged by McBride are also insufficient evidence of actual bias on the part of Judge Koehn. As other jurisdictions have held, the mere fact that a party files a complaint against a judge is not sufficient to establish judicial bias. See In re Winslow, 107 B.R. 752, 753-54 (D. Colo. 1989); Thomas v State, 611 So.2d 416, 419 (Ala. Crim. App. 1992); Moody v. Corsentino, 843 P.2d 1355, 1374 (Colo. 1993); In re Marriage of Mann, 655 P.2d 814, 818 (Colo. 1982); see also In re Disciplinary

Proceedings Against Crosetto, 160 Wis.2d 581, 583-84 (466 N.W.2d 879, 880 (1991) (Recusal of supreme court justices from attorney disciplinary proceeding was not necessary despite the fact that the judges had previously been defendants in an unrelated action brought by the attorney.). Furthermore, neither the letter to the chief judge of the eighth judicial district nor the complaint filed with the Wisconsin Judicial Commission resulted in any discernable consequence for Judge Koehn that would give rise to an inference of judicial bias. Finally, the fact that Judge Koehn was not exposed to public scrutiny as a result of McBride's private complaints leads us to conclude that McBride's complaints, standing alone, are insufficient to demonstrate that Judge Koehn harbored actual bias against her.

In addition to examining each claim purporting to demonstrate bias individually, we must also examine the totality of the

circumstances to determine whether the cumulative effect of the evidence is sufficient to establish McBride's claim that Judge Koehn was actually biased. We conclude that it does not. The circumstances of this case demonstrate at best McBride's concern that Judge Koehn would not treat her fairly. However, McBride failed to introduce any evidence showing that Judge Koehn did in fact treat her unfairly. In fact, the evidence shows that Judge Koehn's review of the warrant was dispassionate and evinced a legitimate concern for the propriety of the requested warrant. McBride's concern over Judge Koehn's impartiality is based solely on her conduct toward him. This is not sufficient to meet her burden of proving bias. Therefore, because McBride has failed to demonstrate by a preponderance of the evidence that Judge Koehn was biased against her, we conclude that McBride's challenge to the search warrant must fail. . . . [There

follows a decision on another issue not material to the present Petition to the United States Supreme Court.]

The judgment and orders are therefore affirmed.

By the Court.--Judgment and orders affirmed.

Recommended for publication in the official reports.

FILED DECEMBER 15, 1992
STATE OF WISCONSIN DOOR COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff,

DECISION

vs.

Case No. 91-CF-146

J. RONALD McBRIDE and
CHALLONER MORSE McBRIDE,
Defendants.

A search warrant was executed on June 4, 1991, at Attorney Challoner Morse McBride's law office. As a result, both she and her husband, J. Ronald McBride, have been charged with various felonies concerning the improper use of client's funds. Mr. McBride, although not a lawyer, worked in the McBride Law Office as well as in a separate business, Absolute Title & Abstract. These two businesses share the same space at 306 S. Third Avenue in Sturgeon Bay.

Because the execution of the search warrant yielded potentially incriminating

evidence against each defendant, both filed companion suppression motions. An evidentiary hearing took place August 26, 1992. Defendants allege three separate grounds for suppression: 1) Door County Circuit Judge John D. Koehn was not a neutral and detached magistrate when he issued the search warrant; 2) the search conducted by law enforcement officials exceeded the scope of the search warrant; and 3) the search warrant was invalid because law enforcement officials effectively searched the premises prior to obtaining the warrant with help of defendant's employees.

Judge Koehn was elected in 1988, and Attorney McBride practiced regularly in front of him until October 1989 when Judge Koehn's court reporter called Attorney McBride and told her that Judge Koehn would recuse himself from all her cases.

This practice continued up to and after the execution of the search warrant, and still exists.

Testimony at the hearing revealed that Attorney McBride supported an opposing candidate in the judicial election that Judge Koehn won. However, within two months of Judge Koehn's taking office (August 1, 1988), Attorney McBride wrote a letter to the Eighth Judicial District Chief Judge, Harold Froehlich, concerning problems that Attorney McBride perceived with Judge Koehn. She wrote a second letter to Judge Froehlich in January 1989 reaffirming her complaints (Her complaints allege unfair treatment of herself and her clients.) Apparently, because of her belief that her perceived problems with Judge Koehn had exacerbated, Attorney McBride filed a complaint with the Wisconsin Judicial Commission on August 31, 1989. This complaint was dismissed in December 1989. It was during the pendency

of this complaint that Judge Koehn, through his court reporter, informed Attorney McBride that he would recuse himself in all of her cases. The authorization of this search warrant is the only time since the pattern of recusal began that Judge Koehn has not recused himself in a legal matter when Attorney McBride was involved.

Defendants contend that Judge Koehn's deviation from his standard practice of recusal demonstrated that he was not a "neutral and detached" magistrate for Fourth Amendment constitutional purposes. While not specifically enunciated, defendants imply this is some sort of nefarious judicial animus and retaliation for reporting Judge Koehn to the Judicial

Commission.[1]

The record at the suppression hearing showed that Judge Koehn had absolutely no knowledge of the investigation of defendants until the search warrant application was made. Therefore, defendants are left to claim that Judge Koehn's purported lack of neutrality and detachment rests upon their subjective belief that his issuance of this search warrant was such a significant deviation from his pattern of recusal to constitute a Fourth Amendment violation. While I agree with the defendants that there is no bright line test for neutrality and detachment, there is a line of demarcation sufficiently clear to separate sunny and dark sides of this constitutional prerequisite. I believe Judge Koehn's

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[1] There is no history of any professional adversary relationship between Judge Koehn and Ronald McBride. Ronald McBride is simply riding the coattails of his wife. Therefore, Ronald McBride has no independent neutrality argument.

execution of this search warrant was accomplished in the broad daylight of high noon.

Defendant's contend that § 757.19(g), Stats., the statute that Judge Koehn relied upon for his recusal, is an objective affirmation by Judge Koehn that he cannot be fair and impartial when Attorney McBride is involved in a case. This statute requires a judge to make subjective evaluation of his or her ability to impartially preside in 'any civil or criminal action or proceeding." A search warrant, or more importantly, the application for one, is not a civil or criminal action or proceeding. A search warrant is a judicially authorized investigation of purported criminal activity. A search warrant (or its application) is not an adversary proceeding. Sec. 757.19(2)(g), Stats., is

statutory direction intended to provide guidance to judges considering recusal in adversary cases. State v. American TV & Appliance, 151 Wis.2d 175. What is dispositive of this motion is whether there was any constitutional due process violation, not any statutory violation. Therefore, a constitutional inquiry into the neutrality requirement of the Fourth Amendment may not always be synonymous with an inquiry into a judge's statutory recusal decision in an adversary context. I say this being mindful that due process requires a fair and neutral magistrate in all legal proceedings.

I am convinced defendants believe that Judge Koehn's recusals are objective evidence of his bias against them because Attorney McBride reported him to the Judicial Commission. But their beliefs are only their subjective opinions based upon Judge Koehn's actions. His recusals can

reasonably be construed as his reaction to what he genuinely perceived was an unfounded, bad faith action taken by Attorney McBride. However, no academic discussion such as which came first, the chicken or the egg, is necessary. There is no evidence to find that Judge Koehn was not neutral and detached when he issued the search warrant.

Acceptance of defendants' position would require a pejorative view of a judge's role when issuing a search warrant. This perspective holds that judge is simply an extension of law enforcement, and not a buffer between coercive police activity and a citizen's right to privacy. Notwithstanding the professional estrangement between Attorney McBride and Judge Koehn, Judge Koehn performed his constitutional duty to be neutral and detached when he issued the

search warrant for incriminating evidence at Attorney McBride's office. The record of the warrant application even showed that Judge Koehn, sua sponte, raised a question about the warrant searching for client records in Attorney McBride's office, based upon his concern about attorney-client privilege. (Page 26-28, June 3, 1991 transcript.) No evidentiary extrapolation supports defendants' position that Judge Koehn eschewed his duty of neutrality and donned the cloak of judicial vengeance while wearing the smirk of a leering jackal.

State v. Walberg, 109 Wis.2d 96, 107 provides a modicum of direction about a negative relationship between a lawyer and a judge. "A mere showing of antagonism or of a strained relationship between counsel and the court is not sufficient to require disqualification. The judicial bias toward the attorney must be sufficiently severe as to reasonably call into question the court's

impartiality toward the litigant." The factual problem between Walberg and the instant case is that it evaluates judicial bias against a lawyer in terms of any impact upon the lawyer's client. Attorney McBride represents no client here. Virtually all reported cases bear this same common denominator. Albeit clumsy, if Attorney McBride was (sic) considered a litigant (not a lawyer representing a client) and one then evaluated Judge Koehn's role as the issuing magistrate, there would still be no due process violation. State v. Rochelt, 165 Wis 2d 373, 380 (quoting State v Hollingsworth, 160 Wis.2d 883, 894) held that:

> A litigant is denied due process only if the judge, in fact, treats him or her unfairly. Margoles v. Johns, 660 F.2d 291 (7th Cir 1981) [(per curiam), cert denied, 455 U.S. 909 (1982)]. A litigant is not deprived of a fundamental fairness guaranteed by the

> constitution either by the appearance of a judge's partiality or by circumstance which might lead one to speculate as to his or her partiality.

What constitutes a lack of neutrality and detachment? U.S. v. Heffington, 952 F.2d 275, 278 describes an impermissible lack of neutrality, "[I]n cases where the particular magistrate was also involved in law enforcement activities, had a pecuniary interest in the outcome of his decision, or had 'wholly abandoned' his judicial role." A violation of the neutrality doctrine requires a magistrate to have a personal stake in the outcome of a search warrant, or, at the very least, a surrender by the magistrate of his or her role as independent arbiter of probable cause.

Judge Koehn did not know anything about the investigation before application was made to him: he did not initiate any investigation of Attorney McBride; he did not profit monetarily; he did not act as a

law enforcement officer. Simply put, he acted as a neutral and detached magistrate. Defendant's subjective opinion of Judge Koehn's lack of neutrality is an attempt to evaluate a personality dispute between a lawyer and a judge to the level of an unconstitutional deprivation of due process.

Heffington[2], 952 f.2d 275, is persuasive on other grounds, too. It rejected the application of standards in various disqualification and recusal statutes in an effort to give meaning to the neutrality and detachment requirement. Heffington, 278-79. Also, the case makes an excellent point when it acknowledges that judges (police officers) in rural counties often know more about local

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[2] It also hold that the harmless error rule is applicable in this type of situation. State v. Walberg, 109 Wis.2d 96, is in accord.

citizens than their urban colleagues. The court said at Heffington, 279:

> Assuming that an appearance of partiality may lurk in the fact that judges and police officers in rural counties often know more about the local criminal recidivists do than their more urban colleagues, we are not prepared to disqualify small-town judges on demand. Here, the appearance clearly is not so 'extreme' that it constitutes a constitutional violation.

This guidance is genuinely applicable here. Judge Koehn is the only Circuit Judge in Door County, and, obviously, he is going to know many of its local citizens, especially one who is a practicing member of the local bar. Defendants' contention that Judge Koehn was not neutral and detached when he sanctioned the search warrant is predicated upon a belief that he could not be neutral after all his recusals in contested cases. Constitutional fairness for Fourth Amendment purposes does not require that Judge Koehn pretend the contentious professional history

with Attorney McBride never existed. It requires only that he not allow any ill will (if any existed) to interfere with his constitutional duty of neutrality. Defendants' subjective opinions of Judge Koehn's mental processes that caused his pattern of recusals are theirs alone. As a result, there is no objective evidentiary basis to find that Judge Koehn's issuance of the search warrant for Attorney McBride's law office was an "extreme" constitutional violation of the neutrality doctrine. Only if a magistrate's purported objectionable conduct is tantamount to a constitutional violation of due process is the neutrality doctrine violated. That did not occur here. There was no constitutional enervation of defendants' Fourth Amendment rights.

The genesis of the information that

formed the foundation of the search warrant for the McBride Law Office came from its two secretaries, Betty Rockendorf and Julie Sullivan. Betty Rockendorf believed that defendants might be stealing money from one of their clients, Eulalia I. Addison. After a cursory discussion of her fears with Julie Sullivan, Betty Rockendorf later that same day took her suspicions to he husband, Scott Rockendorf, a Sturgeon Bay policeman. Mr. Rockendorf opined that there was a possibility of criminal activity by defendants. Rather than report this to his own department, he suggested that his wife and Julie Sullivan go to an attorney for legal advice. Mr. Rockendorf did not want to report this matter to his own department because of the sensitivity associated with defendants being the potential targets. These three people then sought out Attorney Eric Stearn of Green Bay to provide legal advice.

Attorney Stearn, after initial consultation with his clients, arranged a meeting with Special Agent Robert Page and Thomas Fassbender of the Wisconsin Division of Criminal Investigation, Wisconsin Department of Justice. At this first meeting on April 17, 1991, Betty Rockendorf presented Agent Page with copies of documents she made at the McBride Law Office (See p. 109, 8-26-92 transcript for items copies.) This was the only time that she presented Agent Page with copies of documents from the law office, although she may have made copies on more than one occasion. The copies were all made by her after she first spoke to her husband about her suspicions, but before the April 17, 1991 meeting with the agents in Stearn's office. The idea to copy these documents was Betty's alone, and not her police husband's. At this

first meeting, both Betty and Julie agreed they would cooperate with the agents should any further information be needed. In response to inquiries of both secretaries, Agent Page told them the decision to continue working at the McBride Law Office was theirs alone. Only if they felt comfortable staying should either maintain employment at the law office. Julie Sullivan quit in May, 1991, and Betty Rockendorf stayed until June 4, 1991, and then quit immediately at the conclusion of the search warrant's execution. After the first meeting, the agents had two or three contacts with both secretaries, but they were perfunctory contacts.

Only after interviewing Eulalia I. Addison, the putative victim, did the agents believe there was sufficient probable cause to apply for a search warrant. They discovered that Eulalia I. Addison had given $245,000 to the McBride Law Office between

1982 and 1991.

The Sturgeon Bay Police Department took no active role in this investigation. Sergeant Arleigh Porter provided some limited support, but none was investigative. Scott Rockendorf spoke to no one in the Sturgeon Bay Police Department about this situation from the time his wife first discussed her suspicions with him, until after the search warrant's execution and its resulting public knowledge.

The execution of the search warrant yielded a massive amount of material. Substantially all of the financial records of the law office from 1982 to 1991 were seized. (See return for specific items.) Defendants challenge the warrant on several grounds.

Defendant's challenge to the warrant based upon its alleged overbreadth takes

two forms. They allege the warrant failed to recite a specific time period for documents to be seized, and that more documents were seized than authorized. These challenges could be dismissed summarily simply by citing State v. DeSmidt, 155 Wis.2d 119. Factually and legally DeSmidt is so similar that it is controlling, and only a little embellishment is needed. DeSmidt at 138 points out that lack of a time limitation in a search warrant is dependent upon the particular facts of each case. Failure to cite a time limitation is not fatal to this warrant. The agents had discovered that Addison had given the McBride Law Office $245,000 between 1982 and 1991. Certainly common sense would dictate that law enforcement was entitled to determine the commencement date of any criminal activity by defendants to enable them to determine all appropriate charges. That could only be accomplished by

review of office documents during the time period that Ms. Addison was defendant's client.

Just as the informant in DeSmidt provided information described as the "tip of the iceberg," the agents were entitled to believe the same thing about defendants' handling of Addison's legal affairs. The information provided by Betty Rockendorf and corroborated by Addison entitled the agents to draw the same common sense conclusion as drawn in DeSmidt - that is, defendant's handling of Addison's affairs was "permeated with fraud." Even though there was no allegation that the entire law practice was conducted illegally, the agents had probable cause to believe this with respect to Addison. It is important to note that defendants provided Addison with a panoply of legal services - for example:

last will and testament, income taxes, durable power of attorney, and more. As such, a complete review of defendant's records was necessary in order to develop a chronology of legal services defendants provided to Addison. Defendants seem to suggest that a search warrant can only authorize the seizure of evidence that would constitute material proof of an element of a crime that is not barred by the statute of limitations. This is not true. Because the testimony of the application hearing established an ongoing pattern of criminal behavior over the course of many years, it was not unreasonable to omit a time period in the warrant.

As correctly pointed out by Attorney Frank, it was necessary to seize law office records not directly related to dealings between Addison and the McBride Law Office. This was essential to trace what happened to all the money that Addison gave to the law

office. Establishment of the source of money and disposition of funds for each type of account is essential to determine if any fraud occurred. Agent Page's testimony at the suppression hearing (p. 243-247) explains the rational for this. Page further explained that prior to execution of the search warrant the agents had not ruled out which documents would be immaterial to this prosecution. Even though hindsight proved that a great number of items seized were not directly related to these cases, there was sufficient attenuation, albeit indirect, to seize them. Seizure of them was for the legitimate purpose of determining what happened to the money Addison gave defendants. Tracing of Addison's money by examination of the law office records affords the agents not only the ability to find out where Addison's money actually

went, but, but process of elimination, where Addison's money did not go. Because the agents had probable cause to believe defendants' conduct toward Addison was "permeated with fraud," they were justified in seizing the records they did. Even describing these generically as they did in paragraph 6 of the application and warrant was sufficient. DeSmidt, 155 Wis.2d 119, 140.

This search was not defective for overbreadth on either of the grounds alleged. Applying the proper totality of the circumstances test, the issuing magistrate was entitled to make a practical common sense determination that a warrant should issue and authorize seizure of the items sought.

Betty Rockendorf did not conduct warrantless searches of the McBride Law Office. It is absolutely clear that Betty Rockendorf made copies of law office records

before she had her first meeting with the agents on April 17, 1991. Therefore, it was impossible for her to be considered a police agent when she made those copies. It is equally clear that she made the copies on her own initiative. Even thought Betty Rockendorf made the copies after she told her policeman husband of her concerns, Betty Rockendorf did not immediately become deputized through this private husband-wife conversation. Since the Sturgeon Bay Police Department never exercised any law enforcement responsibilities, Scott Rockendorf was never in any official position to confer his law enforcement authority onto his wife.

Even after the April 17, 1991 meeting, Betty Rockendorf conducted no warrantless searches of the law office. Agent Page told both Betty and Julie to

stay employed only as long as either felt safe. It was obvious that the decision to stay at the law office was a voluntary decision that each of the secretaries could make. Neither agent asked Betty Rockendorf to make copies or remove records of the law office between April 17, 1991 and June 4, 1991. Betty and Julie's promises of cooperation were nothing more than fulfillment of a citizen's duty to cooperate with law enforcement when requested. (The record reflects that Betty Rockendorf's involvement was greater than Julie Sullivan's.) After Rockendorf's first meeting with police, the most significant information she provided to them was the layout of the office and where pertinent records could be found. It is obvious she gained this knowledge before the time she made copies of the records, as she had to know where to locate the records in order to copy them. Therefore, her knowledge of the

location of the original records was gained before any police contact; that is, prior to any colorable claim of police agency. Betty Rockendorf's altruistic motivation to report defendants' alleged criminal activity was the same rationale for her voluntary decision to stay at the law office after her report of it. It was very reasonable for her to believe that quitting would cause suspicion on the defendants' part which could lead to the disappearance of potentially incriminating evidence. Reporting suspected criminal behavior and cooperating with a police investigation are born of the same lofty virtue - citizen responsibility.

Defendants have failed to establish any government involvement in a private search. United States v. Snowadzki, 723 F.2d 1427. This case says that a private person becomes a government agent in an

illegal search and seizure if: 1) the government knew of and acquiesced in the intrusive conduct, and 2) the private party performing the search intended to assist law enforcement efforts as opposed to furthering his own needs. Betty Rockendorf's intrusive conduct of copying the McBride Law Office records occurred before the agents knew of her actions. As a result, law enforcement could not have consented to her actions.

Finally, defendants allege a warrant deficiency because it did not name Absolute Title & Abstract as one of the places to be searched. The only thing that separates McBride Law Office from Absolute Title & Abstract is each distinct business name. Absolute Title & Abstract files its own tax return and accompanying Schedule C., but for all practical purposes, the businesses are run as one.

Ronald McBride has acted as office manager of the McBride Law Office for years.

Although his client contacts are down from previous years, he still performs regular administrative duties. All files of both businesses are located in the same common area. No locked doors or closed passages separate the two businesses. The three or four secretaries for both businesses (Sherri Miller and then Joyce Bozik (sic) worked for Absolute Title & Abstract) answered phones for each business. Challoner McBride performed work for both businesses, as did Ronald McBride. (Absolute Title & Abstract sold title insurance and did abstracts.) Clients for both businesses used the same entrance. Even though both business names appear on the building at 306 S. Third Avenue, their physical separation is non-existent. Both business are jointly operated in the same common location with files and records of each open and accessible to employees of

either. To be valid the search warrant only needed to identify the physical location of records - 306 S. Third Avenue. One business name was sufficient. Even if both business names had been omitted from the warrant, that might not be fatally defective as long as the physical description of a premises to be searched is described with sufficient specificity on the warrant: an incorrect or incomplete name does not necessarily require suppression. Defendants' claim that suppression is needed for the warrant's failure to specifically name Absolute Title & Abstract is spurious.

All defendants' motions to suppress are denied. I adopt the State's position in its entirety and make it my own. Attorney Frank is directed to prepare the appropriate Order in conformance herewith.

Dated at Waupaca, Wisconsin, this 15th day of December 1992.

BY THE COURT
s/Philip M. Kirk,
Circuit Judge

Supreme Court, U.S.
FILED
941550 FEB 13 1995
OFFICE OF THE CLERK

CASE NO. ~~OFFICE OF THE CLERK~~

SUPREME COURT of the UNITED STATES

OCTOBER, 1994 TERM

CHALLONER MORSE McBRIDE,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE WISCONSIN SUPREME COURT

APPENDIX B

CHALLONER MORSE McBRIDE,
Pro Se
917 Oak Street
Delafield, WI 53018-1646
(414)646-9888

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TO

APPENDIX

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STATE OF WISCONSIN : DOOR COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff,

FILED

vs. Case No. 91-CF-146

J. RONALD McBRIDE and
CHALLONER MORSE McBRIDE,
Defendants.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant Challoner Morse McBride, by her attorneys Gimbel, Reilly, Guerin & Brown, upon all the records, files and proceedings in this case, moves the court pursuant to the provisions of Wisconsin Statutes section 971.31(2) for an order suppressing for use as evidence any and all articles seized by law enforcement officers on or about June 4, 1991, from the premises located at 306 South Third Avenue, in the City of Sturgeon Bay, Door County, Wisconsin and any evidence flowing from those materials.

AS GROUNDS, Challoner Morse McBride

asserts that the taking of articles from the premises was without a lawful warrant and violated the rights guaranteed to her by the provisions of Article 1, Section 11 of the Wisconsin Constitution, the 4th and 14th Amendments to the United States Constitution and Chapter 968 of the Wisconsin Statutes. More specifically, to-wit: the issuing magistrate was not impartial, there was not sufficient evidence presented to constitute probable cause against Challoner Morse McBride, the seizure exceeded the bounds of the warrant and the police acted contrary to their legal authority.

Challoner Morse McBride further requests that this matter be set for an evidentiary hearing and that the parties be allowed to file additional briefs following that hearing.

This motion is based on the annexed brief.

Dated this 27th day of May, 1992.

GIMBEL, REILLY, GUERIN &

BROWN

By: s/ Franklyn M. Gimbel

Attorneys for Defendant
Challoner Morse McBride

POST OFFICE ADDRESS;

2400 Milwaukee Center
111 E. Kilbourn Avenue
Milwaukee, Wisconsin 53202

Telephone: 414/271-1440
2529I

STATE OF WISCONSIN : DOOR COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,
Plaintiff,

FILED
vs. Case No. 91-CF-146

CHALLONER MORRIS (sic) McBRIDE,
Defendants.

NOTICE OF APPEAL

TO: Sandra Simonar
Clerk of Circuit Court
P.O. Box 670
Sturgeon Bay, WI

Gary J. Schuster
District Attorney
P.O. Box 670
Sturgeon Bay, WI 54235

NOTICE IS HEREBY GIVEN that the defendant in the above-captioned case appeals to the Court of Appeals, District III, from the whole of the order denying postconviction relief entered February 1, 1994, and from the whole of the judgements of conviction dated May 20, 1993, and the amended judgment of conviction dated February 11, 1994, in the Circuit Court for Door County, the Honorable Philip Kirk, presiding, in which the defendant was

convicted of one count of theft by bailee and three counts of theft by fraud contrary to secs. 943.20(1)(b) and 943.20(1)(d), Stats. and the court denied the defendant's motion for postconviction relief.

This is not an appeal within sec. 752.31(2), Stats.

This is not an appeal to be given preference pursuant to statute.

Dated this 15th day of February, 1994.

s/Glenn L. Cushing
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862
(608)266-1971
Attorney for Defendant.

cc: Marilyn L. Graves
Clerk, Court of Appeals
cc: Matthew Frank
Assistant Attorney General
CERTIFIED MAIL RRR#P086 204 726

Defendant's Exhibit

A
8-26-92

McBRIDE LAW OFFICES
POST OFFICE BOX 550
306 South Third Avenue
STURGEON BAY, WISCONSIN 54235

(414)743-8877
CHALLONER MORSE McBRIDE
Attorney At Law

September 15,1989

Honorable Harold V. Froehlich
Chief Judge, 8th Judicial District
c/o William Sucha, Court Administrator
P.O. Box 1600
Green Bay, WI 54305-1600

RE: Zillmer v. Zillmer (Door County Case No. 87-FA-170)
Griep v. Griep (Door County Case No. 86-FA-119)
Shipyard Island Marina v. Gross (Door County Case No. 87-CV-286)

Dear Judge Froehlich:

I am writing this date to inform you of a Complaint I have against Judge John D. Koehn of the Door County Circuit Court. My complaint is regarding the following circumstances:

1. Zillmer v. Zillmer. This is a divorce

and custody matter which has been scheduled to be heard for the full day of Friday, September 16 as a #1 Case. Said Notice of Final Hearing being sent by the Court to both attorneys on March 18th, and my office receiving same on March 21, 1988. On this date, September 15th, I received a call from Attorney Wayne Peterson asking whether or not this date was still on my calendar. I stated to Mr. Peterson that yes, it had been on my calendar since March. Mr. Peterson stated that he had called in April and spoke to Mr. Wesley Gales, the Court Reporter for the Door County Circuit Court and had told him that he had a conflict on his calendar and wouldn't be able to hear Zillmer on the September 16th date. I was never aware of any conflict and did not receive a call or letter from Mr. Peterson that there was any problem. I was fully prepared and most eager to go forward with tomorrow's hearing because of the mental health of my client and her children. Wayne

Peterson informed me that he would be contacting the Court immediately this morning regarding this conflict, but that he just wanted to inform me of what was going on. I stated that I would, of course, object on my client's behalf.

Later that morning, the Judge's deputy clerk, Lori Miller, contacted my office and informed us that Zillmer was being bumped by the Judge. I vehemently objected to no avail. Later that morning, Wayne Peterson contacted me to set up a new court date and the Court gave us the option of May 8, 1989 as a # 1 Case or January 9, 1989 as a # 2 Case. We have, at our client's request, taken the January 9th date.

2. Griep v. Griep. This is a divorce case filed in 1986 which has been set before the Court for final hearing as follows: September 24, 1987 which the Court rescheduled due to Court conflict; October 14, 1987 which the Court rescheduled on

October 13th because Wayne Peterson called Wesley Gales stating Peterson would be on vacation; July 28, 1988 which was set pursuant to a conference call held between our office, Wayne Peterson and the Court on May 16, 1988 to set a #1 hearing date and the July 28th hearing was bumped when Wayne Peterson again called the Court and stated he had a conflict; September 8, 1988 which the Court bumped because it had a criminal matter which extended into the afternoon; December 12, 1988 which the court has presently set for this final hearing as a # 1 Case.

While the deputy clerk, Lori Miller, was setting up possible hearing dates with Mr. Peterson and my secretary on the Zillmer matter, Mr. Peterson stated that he was unable to make a final hearing set for December 12, 1988 on this Griep divorce. My secretary said I would not be agreeable to postponing this matter once again, but she went ahead and spoke with the two of them

regarding possible future dates, in case the Court went ahead and took it off the calendar on the 12th. Lori Miller stated she would take it off and that my secretary should get back to her on the Zillmer matter.

Meanwhile, that afternoon when this office contacted the Court to take the January date on Zillmer, my secretary spoke with Lori Miller about taking Griep off on December 12th and objected to this happening. The Court decided that it would send a letter to Mr. Peterson stating that the December 12th hearing date would stay on the calendar and that Mr. Peterson would have to bring a motion to move said date.

3. Shipyard Island Marina v. Jeff Gross. This is a matter in which I was substituted in for the Defendant, Jeff Gross, on June 16, 1988 by his request and said Substitution was filed with the Court on June 24, 1988. Said matter had already had a

Scheduling Order in effect setting discover due September 13th and trial on September 20, 1988 as a # 4 Case. The previous attorney representing the Defendant in this matter was Philip Johnson, who did no discovery whatsoever, and only answered the Complaint and attended the Scheduling Conference. With this limited time on the case, I have managed to disclose my experts within the time limits, but haven't been able to complete any discovery due to my very heavy court schedule the last two months. On September 12th, I filed a Motion for Continuance with the Court on this matter asking for an extension of the discovery deadline and the trial date because of my inability to adequately prepare for this case.

On today's date, my office contacted Lori Miller, the deputy clerk in the Judge's office and asked whether or not the trial has been put off or a motion hearing had been set. Lori stated she would call us back

after speaking with the Judge. She did call us back and stated that the Judge said "no way" to our continuance and that we were now a # 1 case.

I can only assume that women attorneys are treated one way and male attorneys are treated another. I cannot understand how Attorney Wayne Peterson can be allowed constant continuances the day before by merely a unilateral phone call without even my knowledge and yet, when I bring an actual motion for good cause, my request for continuance is not even considered.

As. Mr. Sucha is aware, I have endured this kind of situation for the last eight years under the former judge, assuming that I would pay my dues and become a part of the system. I am certainly not willing to go though another eight years with a new judge with this kind of inequity based on what I can only assume is a gender gap.

Sincerely,

/Challoner Morse McBride

CMM:sjm

Enclosures

Defendant's Exhibit
B
8-26-92

McBRIDE LAW OFFICES
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306 South Third Avenue
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(414)743-8877

CHALLONER MORSE McBRIDE
Attorney At Law

January 5, 1989

Honorable Harold V. Froehlich
Chief Judge
Outagamie County Courthouse
410 South Walnut Street
Appleton, WI 54911

RE: Continued Problems with Judge John D. Koehn

Dear Judge Froehlich:

This letter is to follow up my telephone call of January 3, 1989, and my prior letter concerning my problems dated September 15, 1988. It is also in response to your request for me to put these specific problems in writing. For ease in reference, I am going to label my paragraphs according to case,

complete with case number, so that you can follow my line of thought.

SHIPYARD ISLAND MARINA, INC. vs. JEFF GROSS,
Case No. 87-CV-286

After my letter to you of September 15, I went in for a motion hearing on my motion for continuance and I am enclosing a copy of that motion hearing transcript. I draw your attention to page 5, especially the area of my arrow, where I bring to the Court's attention the fact that I am afraid that since the opposition is represented by someone from the Pinkert firm, I am afraid that there could be a possible conflict and since I was not privy to when Shipyard Island Marina, Inc. became a Pinkert client, I didn't feel that he could continue on in the case. Thereafter Judge Koehn ruled that I could have a continuance based on the fact that my client was of the Jewish faith and that the trial date was set for a Jewish High Holiday. At that time I had filed with the

Court a copy of the enclosed Affidavit of Challoner Morse McBride as to Prejudice and Sex Discrimination and at the time of the hearing I told him that if he granted the continuance that I would withdraw my Affidavit.

After that hearing, I have had the opportunity to do further research and I have found that the Pinkert, Smith, Koehn, Weir & Jinkins Law Firm set up the corporation of Shipyard Island Marina. I am now in the process of getting those documents from the Secretary of State. I also enclose copies of mortgages, deeds, and other real estate transactions signed by James R. Smith, a partner of Judge Koehn's, all of which were drafted during Judge Koehn's tenure in the Pinkert Law Office, or at least shortly thereafter.

Therefore, I feel it is absolutely imperative for Judge Koehn to remove himself from this action and I have brought a motion

requesting him to do so, which I am also enclosing.

It is clear to me that the Judge has an absolutely impossible conflict in this case and that he cannot continue on. He has already made a ruling in the prior motion hearing of September 20 that my client owes $189.00 for not getting a continuance earlier, however, it is clear to me that that is prejudicial against my client seeing as I had brought my Affidavit of Prejudice the prior day and he should have withdrawn on September 19, thus preventing any possible costs and jeopardy to my client. I feel that his ruling and granting costs to the Plaintiff is a clear violation of his judicial ethics, seeing as he clearly was a partner in the firm when this corporation was a client.

USA FINANCIAL SERVICE vs. RANDALL LeMIEUX AND JUDITH LeMIEUX. Case No. 88-SC-57.

This is a new case about which I have

not complained previously. You will note that it was originally scheduled for Court Trial on the 2nd of February, 1989, clear back in November. On November 21st I wrote the Judge a letter stating that I would be in a criminal jury trial in Green Bay on that date and was not available. The Judge, after a telephone call from my secretary, refused to reschedule the matter and left it on the February 2 calendar. At that time I had no recourse but to bring a Motion for Continuance, which I have also enclosed. That motion for continuance was heard December 20, and I enclose a copy of that transcript. To the best of my knowledge I am the only attorney in this County that ever has to bring a motion for continuance before Judge Koehn, however I did so. At the hearing, Judge Koehn accused my office and therefore myself, of not telling the truth. It was at this hearing that he also advised me that I was going to have to farm cases

out. The facts are as follows:

The case of State vs. Kuljit Nikhanj was, as you well know, moved abut from Judge to Judge because no Green Bay Judge wished to hear it. It was finally assigned to Judge William Donovan. Sometime in early November, my office began to talk with Judge Donovan and District Attorney Zakowski in an attempt to schedule a trial date. Judge Donovan set out preliminary trial dates of January 30th, February 1st, 2nd and 3rd, for this involved trial. Although formal notices had not been sent out, my law office had been notified of this trial and it was placed on our calendar at the time when I wrote Judge Koehn my November 21st letter. It is clear from the transcript on pages 4 and 5 that Judge Koehn did not believe my November 21 letter nor the telephone call from my secretary on November 30, and apparently attempted to call the Green Bay Clerk of Courts office to ascertain whether in fact I was telling the truth as to

the calendaring or not. I am not sure why that calendaring had not filtered through to the Green Bay Courthouse, but my knowledge of visiting Judges is that they set these things up with the attorneys and worry about telling the Courthouse later. I attempted to guarantee Judge Koehn that in fact the Kuljit Nikhanj trial was scheduled for February 2nd, and he obviously chose to disbelieve me. This clearly indicates that I will never be able to go into Judge Koehn's Court and be believed, nor will I ever be able to calendar with Judge Koehn again, since he clearly doubts every word that I or my staff say. I will verify to you, Judge Froehlich, that I do not lie, nor does my staff lie. We believe in the old adage that it is easier to tell the truth because then you don't have to repeat it again. In fact, the Nikhanj trial was canceled. It was canceled at the insistence of both District Attorney Zakowski and myself. He, because he wanted to set the

inquest of the Pulaski car deaths, and I, because I wished to attend the State Bar Convention. (In fact, I have been told that I am going to be a member of the Lawyer Referral Committee and that meetings are held during the Bar Convention, therefore, it is necessary that I go to the State Bar.)

This case clearly places me in the position of being disbelieved by this Court, a position I find untenable.

DELLISE vs. DELLISE, Case No. 88-FA-118

This matter was a Petition for a Temporary Restraining Order which we took to Judge Koehn for his signature and which, per my secretary's Memo to the File, the Judge refused to sign. We thereafter took the Petition to the Family Court Commissioner who signed the Petition and the Temporary Restraining Order and eventually granted us and in injunction.

As you can see, the facts in this

particular request for TRO were particularly egregious and Judge Koehn refused to sign it because there was a divorce already filed and because it was in another County and was another Judge's case. After this experience, in talking with Courthouse personnel, I became aware that Judge Koehn had a policy never to sign a TRO when there was a divorce involved.

OVERBECK vs. OVERBECK, Case No. 88-FA-134

I again had a client who had need of an immediate Temporary Restraining Order. Mrs. Overbeck had come to me sometime in early summer looking at the possibilities of divorce, and at that time she did not mention violence. She did not return to my office until sometime in mid-summer and at that time she still did not authorize me to file a divorce. However, in late November she came in and disclosed to me that she had been beaten and that she was not yet ready to file

a divorce, but wished to have her husband removed from her house. I enclose an Affidavit of my secretary, Julie Sullivan, outlining her contact with Judge Koehn concerning my request to have the enclosed Petition for Temporary Restraining Order and Restraining Order signed. He did, in fact, sign that TRO but warned me that it would be dissolved as soon as a divorce was filed.

I enclose a transcript of the proceedings held on December 1, 1988. As you can see there is not doubt but that in injunctions was required and fact was granted. I particularly call your attention to pages 37 through 40, where the Judge grants the injunction but tells me again that it would be dissolved the minute any divorce papers are filed. I told him that I was afraid that I was going to have a further abused wife and he still refused to do anything but dissolve the injunction the minute the divorce was filed. The Judge told

me that if she was beaten she could charge him with a crime and I tried to explain that Wis. Stat. 813's purpose was to prevent such things and to assist a wife who normally did not feel that she could charge her husband with assault and battery. He merely responded that he was not going to put anyone in the position where the slightest comment might subject him to going to jail. That although the law allowed such an injunction, he wasn't going to do it.

Approximately 40 percent of my practice consists of family law, and in a great portion of the divorces I file there is domestic abuse. In prior years with Judge Stephan, when I had an egregious case I had no problem obtaining the appropriate TRO and Injunction from Judge Stephan. If Judge Koehn is not going to follow the law and grant such TRO's and Injunctions, or if he is going to dissolve them the minute a divorce is filed, he clearly places all women in Door

County in jeopardy of being killed or abused when they file a divorce, and he clearly jeopardizes my ability to practice good law and earn a living.

At one point I contemplated bringing a Writ of Mandamus against Judge Koehn to force him to sign the Dellise papers or to force him to issue a 2-year injunction, and I find that such action is a waste of my time, energy and my client's attorney dollars. It should not have to happen.

DAUBNER vs. RIDGELY TAVERN, INC., Case No. 88-CV-151

This is an action that I filed against the Ridgely Tavern for the personal injury and in fact, death of Robert Daubner, on behalf of his widow, Mary Ann Daubner. I enclose a copy of the Complaint, Answer, and eventually the oral arguments concerning Mr. Kaftan's motion to dismiss. My position all the way through arguments as you can tract to the transcript, was that perhaps I had not

artfully drafted my Complaint, but that, as the Affidavit clearly sets out and as the Amended Complaint clearly sets out, I had a cause of action because of the behavior of Lyle Sconzert. The Judge allowed me to re-plead this matter within 2 weeks, which I did. Nevertheless, he still awarded full costs against me in the amount of $413.00. It was only because I did not allow Attorney Kaftan to slip it through that I even saved paragraph 20, which as you can well see in the oral arguments, was never mentioned by the Judge.

I think the finding of frivolous is a very unusual circumstance and in this particular case where paragraph 16 clearly sets out that Mr. Sconzert's undue pressure and continued harassment caused the death of my client. I think under our newest pleading, I had ample material in the complaint to withstand this motion, especially since the Judge allowed me to re-

plead it within 2 weeks. I am certain that there has not been one other granting of frivolous costs in Judge Koehn's Court outside of this one.

COUNTY OF DOOR vs. ANIMAL WELFARE ASSOCIATION OF DOOR COUNTY, Case No. 88-CV-312

This case was the straw that broke the camel's back. I was out of my office for a vacation between Christmas and New Years to be with my five sons and when I came back, I was advised by my staff that we got a phone call from Betty Marshall who runs Animal Welfare after she read the Door County Advocate article wondering what had happened. When my secretary investigated she found that apparently the Court went forward with the default hearing on December 28th although my December 19 letter was in the file as well as my request to file a late answer and my Motion to Dismiss or in the alternative Answer and Affirmative Defenses. I have ordered the transcript for these hearings, as

I understand that it took Mr. Costello some time to get witnesses which the Judge required before he would give a default judgement. I am also in the process of getting a copy of the Order or Injunction which the Corporation Counsel's office assured me was to be signed yesterday or today.

When this matter was originally filed, my clients and I felt that we had a number of defenses but that the answer was very complicated and we also though that there was a possibility that we could negotiate with the Corporation Counsel. Because of that, I called Dennis Costello and he told me that I could have as long as I needed to file the answer. I did receive back from him his October 31st letter giving me another 20 days. However, since my client wasn't served until October 17, I felt that I had until at least November 6, and because we were still negotiating and the Corporation Counsel did

not indicate to me that there was any urgency in this matter, that my answer would be timely. I was very surprised on December 19 when I received a Notice of Application for Default Judgement and I called Mr. Costello and asked him why he had filed that when we had an agreement that I had an extension, and he had no particular answer for me. I immediately, when I saw that the hearing was to be held during my vacation, wrote the Judge my December 19 letter and asked for a rescheduling because I was on vacation which he already knew in several other matters, and I also immediately filed my Request to File Late Answer and Motion to Dismiss, etc. Nevertheless, Judge Koehn went forward and granted an Injunction of some sort and held a hearing when he was well aware that I was not available. I had checked with Mr. Costello and he had no problems rescheduling the default hearing. Especially since I had filed the Answer and the law abhors a

default, I could not fathom any Judge going forward, but Judge Koehn did.

There are other problems that you are probably aware of between myself and Judge Koehn, one being the fact that I sued on behalf of my client, Thomas Noll, his brother, Charles R. Koehn, a case with which you are intimately familiar. After that trial was over, Judge Koehn did remark to me that his brother would get even with me, a remark that I dismissed at the time.

Further, Judge Koehn is well aware that I supported Sven V. Kirkegaard during the Primary Election and Peter C. Diltz during the Final Election.

As a final problem concerning Judge Koehn sitting on any matters in which the Pinkert firm is involved, I would point out to the Court that I believe that the entire firm, including Judge Koehn, is presently being sued in Federal Court for fraud and misrepresentation in a matter involving the

Hutter Foundation and the Emily Stewart Foundation. I think that for him to continue to sit on cases in which any of the Pinkert lawyers are involved when he is still inexorably bound up in matters with that firm, such as being sued, is most improper.

Because the Gross matter is coming on for hearing rather quickly, I have filed in individual motion asking Judge Koehn to remove himself (as I have enclosed). However, I am in the process of drafting a motion to remove Judge Koehn from all cases in which I am involved. I enclose a rough draft of that motion, although I have not yet filed it in any cases.

It is apparent to me that for whatever reason, Judge John D. Koehn has decided to put me out of the practice of law in Door County, Wisconsin. I don't ever recall having done anything to incur his wrath outside of the incident with his brother, but I believe that it is a Judge's position to

rise above things such as that. I have had to spend somewhere between $300-$500 in this last month or so purchasing the transcripts which I have sent to you and uncounted unbillable hours in reviewing this material and putting it together in a file and in drafting this letter. Additionally, there is the mental aguish and the mental torment of having to go through such a situation such as this. I am not sure what you can do to remedy this situation. I would appreciate any help that you can give me. It is clear to me that at some point I am going to have to take this entire matter to the Judicial Commission. I have been loathe to do so and in fact have been loathe to report the situation to you, but it is clear that it cannot continue in this fashion. My clients deserve an impartial judiciary just as all other attorney's clients do, and I don't believe I can get that for them from Judge John D. Koehn.

Sincerely,

s/ Challoner Morse McBride

CMM:btr

Enclosures

Defendant's Exhibit
C
8-26-92

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August 31, 1989

Wisconsin Judicial Commission
Room 606
110 East Main Street
Madison, WI 53703

Attention: Ms. Elana Capella

RE: Complaint Against Judge John D. Koehn,
Door County Circuit Judge

Dear Ms. Capella:

I am requesting that the Judicial Commission for the State of Wisconsin Investigate John D. Koehn, Door County Circuit Judge.

The Honorable John D. Koehn was appointed to the Circuit Court on or about April 1988, and was elected during November,

1987.

I moved to Door County in September of 1979 after having accepted a position with Attorney James O. Ebbeson. I left Mr. Ebbeson in mid-Summer of 1980 and opened an office as a solo practitioner. My practice is divided into about four parts, as follows:

a) Family Law- 40 percent. Of that 40%, about 15% is battered women referred to my office by various help groups in Door County. About 20% is Family practice and about 5% is Pro Bono.

b) Criminal Law - mostly felonies as assigned by the State Public Defender. About 5% of the above 15% is Public Defender and private appellate work.

c) Personal Injury - 30 percent. Automobile, worker's compensation, and social security.

d) The remaining 15% is real estate work and other miscellaneous work.

It should be noted that in my 10 years of Door County practice I have never been assigned a Guardian ad Litem case, a Court-appointed Guardian, or any other type of case out of the Door County Circuit Court. This

is true for both Judge Edwin C. Stephan and Judge John D. Koehn.

For most of my 10 years, Judge Edwin C. Stephan was the Judge (September, 1979 to April, 1988), and I understand how hard it is for a long-tenured Judge to accept women as attorneys. In the early days, I remember a couple of older reserve Judges looked at me and very courteously told me that they would have to have the attorney present, not the secretary. I understood Judge Stephan's narrow view of my abilities, and I was willing to pay my dues. I have done so for 10 years, but not any more! Judge Koehn and I are peers and I expect that attitude in Court. I no longer have to be treated as a second-class attorney.

The real damage in this continuing saga is to my clients. In the last 3 years to the present time, I have been forced to refer new clients to other firms because I was positive they would lose if I represented them.

Both Edwin C. Stephan and John D. Koehn originally come form the Pinkert, Smith, Koehn & Weir Firm. This firm is today the Pinkert, Smith, Weir, Jinkins & Nesbitt Firm (plus a new young attorney). This has meant a bias toward that firm since I have been in Sturgeon Bay. It has impacted negatively on my clients and on my practice. The one case that comes very vividly to mind involved Russell Brown, and attorney from Minneapolis. His firm represented Land of Lakes, the corporate center being in Minnesota. This particular case was an action filed by Butler Beverage against Lake to Lake, a subsidiary of Land of Lakes. Attorney Brown and one of his partners flew to Sturgeon Bay and tried to engage me. My association and friendship with Attorney Brown goes back to our high school years, some 30 years. Attorney Brown and this partner wanted my office to be the local counsel, which would have paid my office between $5,000 and $10,000. I had to

turn him down because Judge Stephan was the Judge, and I knew Land of Lakes would not get fair treatment if I represented them. I referred this action to the Pinkert firm. I felt it was a shame to have to tell a very close friend that he needed another firm to represent Land of Lakes in order to get fair treatment in court, but I felt it was necessary because of our friendship.

Why my clients are not treated fairly, I can only guess. Probably at least partially because I am a woman. It is clear to me that women attorneys and their clients are not treated the same as male attorneys in this Court. We have four women in the Door County Bar -- Colleen Cotè, Trudy Toft, Linda O'Brien and myself. Colleen Cotè left the practice of Law because of Judge Koehn's treatment and attitude towards her. Trudy Toft is in her father's firm and does very little court work, and Linda O'Brien was formerly with the Pinkert Firm, although I

think she is no longer practicing law, and then there is me. I have a large practice and it could be even better if my clients and I were treated evenly by Judge Koehn.

I could substitute Judge Koehn. I did this to Judge Stephan about five years ago and it only made the Brown and Kewaunee County Judges angry having to come to Door County all the time. Judge Stephan and I finally worked out our differences, so long as the Pinkert firm was not involved.

About three year ago a Brown County (Green Bay) law firm asked me to take a Personal Injury case against a Brown County attorney. The attorney I sued was Charles R. Koehn, Judge John D. Koehn's brother. See Exhibit 1. At the time I did not even think about then-Attorney John D. Koehn and any reaction he might have. The case went to the Jury and they found for neither party. But later, then-Attorney John D. Koehn sought me out at the Courthouse and warned me that his

brother would not rest until he got even. I though he meant Charles R. Koehn, not Judge John D. Koehn.

Judge Koehn had done considerable will and estate work in his practice prior to becoming Judge. I had two cases that challenged Wills that had been written by Judge John D. Koehn while he was at Pinkert, Smith, Koehn, Weir & Jinkins. In the Estate of David, I represented the husband in a case where his wife was murdered by one of her several sons. John D. Koehn wrote a pre-nuptial agreement and will giving everything to the sons. In Estate of Yaccino, John D. Koehn wrote a will of an elderly man giving his entire estate to friends (third-parties) and not to his sister or nieces or nephews. Prior to filing suit, Yaccino's treating physician said he lacked the requisite testamentary intent to draft a will. According to my clients, as told me after trial, the Judge sitting on the Yaccino case

went down to Judge Koehn's chambers during several of the breaks during the trial. I had to call Judge John D. Koehn as a witness in both cases. Both wills were upheld.

It did not take long for me to find out that I was going to be Judge John D. Koehn's Whipping "girl." The real problem was that he took over Judge Edwin C. Stephan's caseload and I had no substitution privileges. At one point I even filed an affidavit of prejudice and sexual harassment and sexual discrimination. See Exhibit 13, Gross v. Shipyard Island Marina, Affidavit of Challoner Morse McBride, September 19, 1988. The judge refused to recuse himself.

In my ten years in Door County, I am not sure that I ever was awarded costs and/or fees when I won a motion hearing. But I always paid costs if I lost.

I will probably survive this situation. The big loser will be the lay public and my clients. My clients expect fairness and they

are entitled to it. When I have to tell them it is not always possible, they are hard put to understand or believe it. The clients and justice are the losers, not just Challoner Morse McBride.

If this were just a quiet fight between Judge Koehn and myself I could handle it, but it is not. The Door County and Kewaunee County Bar know about it as well as the Court practitioners in Brown County. I am like a lame duck on a pond. They file motion after motion and I lose and pays costs. I feel this is beginning to affect my practice. Judge John D. Koehn told me in chambers that there should be no more solo practitioners because they foul up the Court's calendar. See Exhibit 13, Note of Challoner Morse McBride.

I am the only attorney in the Bar that has to get written permission for a continuance. If a male attorney requests a continuance, he gets it by phone, and I am

not informed until I get to the Court room.

I am also ordered to prepare my case, whether I am a #2 or a #4. I must check with the court at 2 p.m. the day before the trial date to see if my case is a #1. It is very difficult to bring in experts and lay witnesses in less than 3 hours.

I first took the situation to the Honorable Harold V. Froehlich, Chief Judge of the Eighth Judicial District. I though I should go through the chain of command. The letter to him and his response are attached as Exhibit 2.

I am attaching some of the worst case scenarios for you to review, although they may or may not be in chronological order, and they certainly are not <u>all</u> the problems.

1. One of the tools that has been a life-saver to abused women in Door County is the Temporary Restraining Order (TRO) in marital cases and I have used it many times. For me, the rules have now been changed.

Judge John D. Koehn dissolves my TRO's when the divorce is filed, however, when I represent the man, he continues the TRO for the women until Peter C. Diltz, the Family Court Commissioner, has an order in place. See Overbeck and Hollister, attached as Exhibits 3A and 3B.

2. Barney v. Williams. This is a small claims case. My client, the Defendant, is in the Air Force. I was retained on July 7, 1988. My client then reported for Duty on July 27th. I had no prior knowledge of this before July 7, 1988. I had written my client and asked when he would return home. Eventually, the Judge gave me a date for which my client had to take leave. Exhibit 4.

3. Buechner v. Buechner is another example of the Double Standard imposed on me as opposed to male attorneys. Attorney Brooks and I were stipulating this divorce so that we could be heard before Peter C. Diltz,

Door County Family Court Commissioner at Final hearing. I had discussed this with Attorney Brooks and he agreed to get the trial date postponed. When I got back from the other Court, I was told that Judge Koehn had assessed costs against me and the Judge had the hearing without me. Attorney Brooks had previously canceled a final hearing on this very matter on the morning of the trial and had not been assessed costs. Exhibit 5.

4. As I said in the first part of this complaint, about 40% of my practice is Family Law. In Overbeck v. Overbeck, I filed a Petition for a Temporary Restraining Order against the husband, It will be necessary to read the complete transcript, but I particularly point to the Transcript page 37, 38, 39 and 40. We have a husband that openly admits physical abuse to his wife and a Judge that will only grant the TRO until the divorce is filed. It is clear that Judge Koehn feels that a Man's Castle is his Home.

It is clear that Judge Koehn feels that he does not have to follow the law. See Exhibit 3A.

5. On November 11, 1988 USA Financial v. Randy & Judith LeMieux, Exhibit 6, was set by the Court as a #2 at 9:00 a.m. for February 2, 1989, in the Door County Circuit Court. On November 21, 1988, I wrote the court asking for a continuance because I would be defending Kuljit Nikhanj in an attempted murder charge wherein my client is alleged to have attempted to blow up a Green Bay attorney.

On December 1, 1988, the Scheduling Clerk, Lori Miller, wrote me saying that Judge John D. Koehn would not grant me a continuance on LeMieux. LeMieux was still a #2 on February 2, 1989 at 9:30 a.m. On December 2, 1988, I filed a formal Notice of Motion and Motion for Continuance for the LeMieux hearing. On December 8, 1988, I received a notice for the continuance hearing

as a # 1 on December 20, 1988, at 10:00 a.m. Only my client and myself appeared at this motion hearing and the Judge granted my continuance. Before the Judge left the bench, he made a very serious charge concerning my office staff, my calendar and my practice. See pages 4, 5, and 6 of the Court record.

I have some problem with the Judge telling me to reduce my workload. I fulfill my responsibilities to my clients. Most of the Sturgeon Bay trial attorneys have found it quite useful to check dates with each other prior to asking the Court for a date. The Court refuses to do this. What really upsets me is the Judge's unfounded attack of my office staff. On page 4 of the LeMieux transcript he accused my staff of lying to the Court and this is <u>not</u> <u>true</u>. Judge John D. Koehn stated from the bench and on the record that there was no truth about the Kuljit Nikhanj trial being set for February

1, 2 and 3, 1989. I do not know who did Judge Koehn's investigating of the Nikhanj trial, but they gave him bad advice on this file and in a later file that I will attach.

My secretary has written the events of the Kuljit Nikhanj pre-trial schedule in a memo. I was the third attorney appointed by the Public Defender's office to represent the Defendant. To the best of my memory, by the time I was allowed to withdraw, the case had been before at least 5 Judges and it probably is true that the Brown County Clerk of Court did not show this trial on her calendar. By the time we were able to get a trial date from Judge Donovan, a Judge from Marinette, Wisconsin, Kuljit Nikhanj had asked that I be terminated and he was gong to defend himself Pro Se. See the Memo of BTR dated 7789. Exhibit 7. I should not have to defend my staff. Judge Koehn's charges are heinous and totally without merit.

My full-time office staff is as follows:

1) Elizabeth Tice Rockendorf, age 27, has been with me for 10 years.

2) Sherri Miller, age 27, has been with me 5 years, and she formerly worked for Attorney Eric Stearn.

3) Julie Sullivan, age 18, has been with me one year.

4) My husband, Ron McBride, age 52, has been with me for 16 years. Over the years we have formulated an office procedure that I am sure conforms with the Wisconsin Bar and American Bar Rules. Each secretary has her own area of our work and my husband is available to discuss the mechanics of this office procedure.

We publish an office manual and furnish a copy to each employee. In the ten years of my practice in Door County, I have only had 5 secretaries -- one quit to get married and work in Chicago and the other one quit to stay home with children. When calendaring with the Judge's office, my staff NEVER makes

up stories. We don't have to -- I simply have a busy calendar. The Judge has every right to chastise me from the Bench if I have done something wrong, he has no right to accuse my staff of lying.

7. Dellise v. Dellise is a divorce file. Judge John D. Koehn refused to sign a Temporary Restraining Order after reading my client's statement of October 24, 2988. It took me until 10/28/88 to have my Motion for Temporary Restraining Order heard by Peter C. Diltz, Family Court Commissioner for Door County. My secretary's Memo to the file again emphasizes the Judge's attitude toward women. Exhibit 8.

8. County of Door v. Animal Welfare Association of Door County, Inc. is a zoning matter. Exhibit 9. This confrontation has been going on for some time. It started when the Town Board of Sevastapol passed an ordinance restricting the number of dogs a person could have in the Township. My

client, Betty Marshall, started the animal shelter a long time ago. She operates by donation for the placement of dogs and cats.

Animal Welfare sued the County and all townships in the county for fees for collecting their strays. This matter was finally resolved by Judge N. Patrick Crooks sitting as the Door County Circuit Judge. Judge Crooks ruled that Animal Welfare Association of Door County was entitled to recover fees every two years by statute. The parties eventually stipulated to dismiss the matter if the governmental institutions would support the work of Animal Welfare. They, the Townships of Door County, have not paid an the Town Marshals and Deputy Sheriff's still send dogs to Animal Welfare Association of Door County and Mrs. Marshall still take them. The case at bar was started by the Town of Jacksonport and the Door County Planning Commission. Mrs. Marshall and the Animal Welfare Association of Door County

were gifted a large farm on County Trunk "A" in the Town of Jacksonport. Somebody found out about the gift and its intended use and the war began. Mrs. Marshall and David Barney made application for a variance, pro se. I was not retained until 10/19/88 when my clients were served by Sheriff.

I called the Corporation Counsel, Dennis Costello, and we were discussing some type of compromise to let my client request another hearing before the County Planning Commission. We negotiated but were unable to settle. On December 19, 1988, I received notice of the default hearing and I immediately wrote the Judge for a continuance because I would be on vacation at the time of the hearing. My winter vacation is some days before Christmas until after the New Year. This is the time that my three sisters and all of the cousins (including my 5 sons) get together. I am attaching my last five year's calendars showing where my winter vacation

falls over the Christmas period. Exhibit 9. The Court was well aware of the fact that I always took vacation at this time because I wrote many letters on many files stating that I would not be available at that time. On December 19, 1988. I wrote the Judge, my client and Dennis Costello and asked that the hearing be held any time in January when I was in the County. I had checked this out first with Attorney Costello and had gotten his approval. On December 20, 1988, I filed a request to file a late answer, a Motion to Dismiss, and in the alternative and Answer and Affirmative Defenses. The Corporation Counsel and I continued to discuss this matter and he assured me that he would not default me. Mr. Costello's statement to the Judge on page 5-6 of the Transcript, line 19, does not reflect what we had agreed upon. I submit that Costello believed that the Default hearing was off. He appeared in the Courtroom without any witnesses and when the

Judge told him he wanted to hear testimony, Mr. Costello spent the next 30-60 minutes finding someone to testify. The fact that no witnesses showed up makes one question Mr. Costello's word.

After Mr. Costello found David Sautebin, some testimony was taken and the Judge gave the County a Default Judgement. I would never have believed that I couldn't take Mr. Costello's word. Noting would have been lost had they waited another week for my vacation to end.

In a file I will discuss next, Stephanie Bailey-Britton v. Strahl, my case was dismissed because Judge Koehn did not like my affidavits, however in this case, Animal Welfare Association of Door County, the Judge accepted affidavits containing the same language that I used in the Bailey-Britton file. I can only assume that there is one set of standards for the male attorneys and one for the woman lawyers.

When my office staff was contacted by Betty Marshall, they checked with the clerks office and were told about the Default. One of the Deputy Clerks (Mary) told them that the Answers were in the Court file! Attached is the file note.

Up until now most of these jabs had been at me, a few hurt my clients, but now it became apparent that the Judge wanted me out of "his Court." I am attaching the newspaper reports of the action. This action by the Judge was clearly meant to hurt my practice. I filed a Motion to Set Aside the Default. That, too, was denied.

9. In Daubner vs. Ridgely, Exhibit 11, I represented the Plaintiff for herself and as surviving spouse to Robert Daubner. On October 19, 1988, a motion hearing was to be heard on Defendant's partial motion to dismiss Plaintiff's complaint. Mr. Kaftan filed no motion or notice of motion with the Court or my office. I did receive a copy of

a Brief to support his argument for frivolous costs. I made the argument that Defendant's motion had never been filed, as such, therefore it was never properly before the Court. In the Gross case, below, the Judge would not even hear my Motion for Continuance because i had filed no Notice of Motion. Here, Mr. Kaftan didn't even file a motion, yet he was heard and his motion was granted.

Mr. Kaftan wanted my second cause of action to be dismissed upon its face. If our complaint were as he perceived it, it may be that, based on a case he tried and lost, that the Court should dismiss my action. However, this was not my theory in this case. If you read my brief on this matter, I was going down a different street. My theory had nothing to do with the insurance company not paying. I expect to prove that the claims agent, by his actions and harassment caused the Plaintiff's deceased husband to shoot himself. My theory in this case is well

documented in case law. On page 21 of the transcript I believe that my view of this action is correct and should be heard by its fact finders.

In this case, Mr. Kaftan is allowed to not follow civil procedure and I am held to the 4 corners of my Complaint. The outcome was that I was ordered to pay actual costs and replead. It is quite obvious that I am held to a different standard than most other people.

10. In Stephanie Bailey-Britton v. Strahl, I represented the Plaintiff and the Defendant was Pro Se. This is the case that I alluded to in paragraph 8. This case and the following are the most grievous because my clients not only lost by the Judge's new rules, but the loss cost them several thousands of dollars. Stephanie Bailey-Britton called my offices to secure my services. She and her sister were residing in Arizona and they asked me to engage a

reputable real estate firm to put their Beach Road house on the market. They had Real Estate Brokers list it, but they asked me to find someone that could sell it. After reviewing my Title & Abstract records, I suggested Wilson-Shaffer of Ephraim. They had sold a good deal of Ephraim and Sister Bay real estate recently. I called the Wilson-Shaffer broker, Kathy Barnett, and told her of the request of Stephanie Bailey-Britton and her sister. I asked that she contact them. At this point there was nothing else to do from my standpoint.

To the best of my knowledge, the Realtors and the Sellers made contact and a Listing Agreement was signed. I did not hear anything until both the Realtor and Seller called me with a problem. It seemed that the surveyor found 3 of the 4 existing buildings encroaching on the property to the North. This property was owned by Donald Strahl of Milwaukee.

I do not know Mr. Strahl. He had called the office several times trying to get my office to intercede for him in the purchase of the Bailey-Britton property. Each time I referred him to the Realtor. In fact, he had been trying to by this property for some time from the owners but at a price far below its market value. Had we all known what was going to happen in the next few months, we would have made money by selling to Mr. Strahl.

By this time we had a Buyer, 3 attorneys, one Realtor and the Sellers involved, plus the owner to the South of the property who had bought a strip of land from the Sellers to put in a direct access road, but our clients failed to ask him for an easement on this road so the only access to the Bailey-Britton property was a 3/4 of a mile grass and gavel easement that started about 6 properties north and ran to Mr. Strahl's property. Somewhere in the selling

and passing of Deeds to this property, the easement to the Bailey-Britton property had disappeared.

The saving factor in this mess was that Strahl had owned his property for abut 30 years and the Bailey-Britton property had been in the family about 60 years. In other words, we had adverse possession of the ground under 2 of the large buildings and the only building left was a small metal building to put lawn equipment in, which could be moved.

The buyers, of course, wanted the mess cleaned up, as did the lending Savings and Loan. The buyer's attorney was doing her best to reassure the buyers that this was a problem that could be cleaned up. The Boat house/guest house were encroaching the same amount - the metal shed could be moved with little effort. This house had been on the market for about 4 years so it was most imperative that we hold on to the Buyers.

I contacted Mr. Strahl in an effort to buy about 6 feet - he said no. I then filed a quiet title action in Door County Circuit Court. It took about 3 weeks to get service on Mr. Strahl. He had boarded up all his windows and unplugged his phone. Finally our process server caught him sneaking out of the house one morning about 6:a.m. I then sent Mr. Strahl a set of Admissions. Mr. Strahl answered the Complaint in layman's language and it was accepted by the Court as an Answer. He also answered the Admissions. I asked for a Summary Judgment date and the case was set for January 14, 1989. I filed several Affidavits and the Admissions along with my motion.

At the Summary Judgement Motion Hearing, Mr. Strahl admitted that the boat house and the practice house had been there far in excess of 30 years. I also tendered another affidavit from Christine Bridenhagen, Nee Peterson, who had lived about 2 properties

north of the Bailey-Britton/Donald Strahl property and she stated that the 2 buildings had been there for in excess of 20 years.

Instead, Judge Koehn refused to grant summary judgment on the basis that the Affidavits did not conform to his standards. I offered to prepare another Affidavit and have it back in 5 minutes. I pointed to the Admissions of the Defendant. He denied my motion.

My affidavit and its wording were the same as the Affidavit filed by Corporation Counsel Dennis Costello in the Animal Shelter case that Judge Koehn granted the Default Judgement to Door County in December of 1988 while I was on vacation.

On Mr. Strahl's Admission and statements in court alone, my clients were entitled to a Summary Judgement!

Because it would have costs my client more to re-file the Summary Judgement, and in the interest of preserving the sale, my

clients paid Mr. Strahl $2,000.00 to purchase about 6 feet of land. They paid my office an additional $5,000.00 to obtain proper easements for the roadway into the property and for the enormous amount of legal work to satisfy the lender. The attorney for the lender was James Smith, the Judge's ex-partner. The property had to be resurveyed and a new description made. My client had to agree to rent the property to the Buyer for a $1.00 a month to hold them. Bailey-Britton had to pay the Interest difference to the lender because they had a 60-day commitment and the interest rates went up after 60 days. Because of Judge John Koehn's action, my clients paid approximately $10,000 to $11,000 more than they should have. Exhibit 12.

11. In Shipyard Island Marina v. Jeff Gross, d/b/a ARC, Exhibit 13, I represented Jeff Gross. On or about June 24, 1988 I was contacted by Mr. Gross. He asked if I would represent him in this action. Prior to that

date, he had been represented by Attorney Philip Johnson of Johnson, Herlache, Johnson & Johnson. I told Mr. Gross that Phil Johnson was a fine attorney and I couldn't understand why he wanted to substitute him. Mr. Gross stated that Attorney Johnson had done nothing for him.

I told Mr. Gross that I would get back to him after I talked to Phil Johnson. Phil told me that Mr. Gross was hard to deal with and he would appreciate me continuing the case and that he would get the file down to me. Attorney Johnson also told me there was s Motion for Summary Judgement set in a few days. I told him that since he knew the facts far better than I, he should attend the Summary Judgment. He did, and kept the case in Court. I called Mr. Gross, who is the Good Year Tire Dealer in Skokie, Illinois, and told him we had withstood the Summary Judgement. He asked that I represent him in this matter to a conclusion. Attorney Phil

Johnson had done no discovery. Except for the Plaintiff in this matter, all of those Defendants experts were in Chicago or Southern Illinois. I contacted the people and was trying to arrange depositions but this was the peak of boat preparation and I ran into a lot of resistance.

The trial was set for September 20, 1988. It was set as a #4 until September 12, when it got moved up. At that time, I filed a Motion for Continuance. I served and Affidavit of Prejudice on the Judge on September 19, 1988 and had a conference with him and Attorney Nesbitt, at which time the Judge criticized me for filing no Notice of Motion. When I called my client on September 19, 1988 to tell him the trial was going, he stated that he is an Orthodox Jew and September 20-21 are the Holiest of Holy Days in the Jewish Faith.

I presented this fact to the Judge at the Motion on September 20, 1988, and he

continued the case, ordering my client to pay approximately $189 in costs and he set a new trial date for January 10, 1989. I had also filed an Affidavit of Prejudice asking the Judge that he recuse himself for several reasons, and he side-stepped that issue. When I told my client that the Judge would not recuse himself in the matter, even though he had had personal contact with the Plaintiffs, Mr. Gross told me to do the best I could. He didn't want to be an in-person spectator to what he knew was going to happen. He said he lived in Chicago and he knew what was going to happen.

The matter was then set for January 10, 1989. On January 4, 1989, I filed a Notice of Motion and Motion to Disqualify the Judge. That hearing was held prior to trial. The Judge said he would get off the case if he had any involvement with the Plaintiff. He had had a one hour Will conference with them, but still would not get off. I also

presented the Judge with corporate and real estate records of the Pinkert Firm's contacts with the Munaos.

Of course, Shipyard Island Marina won and during the trial, Judge John D. Koehn made a statement on the record that he had checked and there were no Jewish Holidays indicated on or about September 20, 1988. I submitted and affidavit from Rabbi Sidney Vinburg of the Congregation Onessa Israel stating that September 20-21, 1988, were the highest of Holy Days in the Jewish Faith.

12. The last case that I am going to discuss is Pichette v. Neuville. I have been the family attorney for the Pichette family since about 1979. In 1982, Rosy Pichette came in to the office about her son, Thomas Pichette, being injured by a Bull. I went over the documents she had and suggested that she look for another law firm and that I would help her do that. I had to turn her down because I was involved in two other

personal injury cases with an enormous amount of money involved and did not have the resources to fund the Pichette loss -- I know it would take between $3000.00 and $5000.00 just to prepare it for trial. We talked about the progress of the investigation from time to time when I did other law work for her. She had hired the law firm of Mouw & Celello and it certainly seemed to me that they were doing an excellent job.

Some time around 1987 her husband died and we handled the probate. About a year ago, Mouw & Celello decided to pull out of the case for Tom Pichette. Proof of liability had always been a major problem since no one other than the Bull and/or Cows and Tom knew what really happened and Tom is totally disabled and has retrograde amnesia. We were able to prove that Mrs. Neuville's 13 cattle (cows and bull) had broken the fence between the two farms and were running wild on the Pichette farm for two weeks prior to

the accident.

On the day of the accident Tom and his younger brother, Patrick, were taking turns riding a miniature motorcycle. The motorcycle had a top speed of about 40 mph and a maximum weight limit of about 120. Tom weighed 140 pounds so the top speed of the motorcycle would have been reduced to somewhere around 35 mph. This accident happened on a somewhat grassy field. The best guess is that Tom got too close to the cows and the bull charged him. Patrick heard the animals snort or beller at the same time the motorcycle revved. Further, he saw the cattle leaving the scene of the accident.

The Defendant had asked Dr. Wright, a local Vet, to round up the cows. He was unable to do it because they had turned wild. The Defendant then hired Mr. Hembel to come and sedate them. He got several sedated by shooting them with a bow and tranquilizer arrows.

While the cows were on the Pichette property, they trampled the family vegetable garden. This was a much-needed garden so they could eat during the winter. This is a reasonably poor family. The cows also attacked their car and truck, doing great damage to them.

In October of 1987, I agreed to take on the case. I had enough reserved to fund the rest of the discovery. I knew and had explained to my client that liability was still a major problem and that there was a chance we could lose.

About 2 weeks prior to the trial, the pre-trial was held with Judge Koehn presiding. It was at about this time I found out that Attorney Pinkert was representing Mrs. Neuville for the overage. She only had $100,000.00 in farm liability coverage, so her insurance carrier, State Farm, had advised her that she should hire private counsel.

I immediately asked the Judge to recuse himself or ask Mr. Pinkert to refer the case out. I said that I did not feel comfortable with Judge John Koehn hearing this action with Mr. Pinkert representing the Defendant. The Judge refused to recuse himself and stated that the Defendant had the right to choose the counsel of her choice. We then discussed the matter of jury instructions. I proffered 5 to 7 Jury Instructions having to do with cattle causing damage. Later, at the Instruction Conference, the Judge refused to let any of them in. Only Mr. Pinkert's and Mr. Deadman's (attorney for State Farm) Instructions were allowed in. Exhibit 14.

During the pre-trial, after I had objected to Mr. Pinkert representing Mrs. Neuville, the Judge for some reason blurted out that he did admit that he was still collecting money on a monthly basis from Pinkert, Smith, Weir, Jinkins & Nesbitt on

an old Land Contract (Exhibit 15) and that he was a Party Defendant in a Federal RICO lawsuit, a copy of the Complaint is attached. Exhibit 16.

The trail started on Tuesday, August 1, 1989. Plaintiff's part went through Thursday morning and Defendant called only two witnesses, the Defendant and a Deputy Sheriff. On Thursday afternoon we did closing arguments and jury instructions. Thursday evening, after Court closed, Rosy asked me why I was not at the Lawyer's meeting right after lunch on Wednesday or Thursday. I told her that I didn't know there was a meeting. She told me that the Judge, Mr. Pinkert and Mr. Deadman were standing at the counter in the Judge's outer office having a meeting. Rosy said the outer door to this office was open 18" or so and she could hear part of what they were saying. The attorneys were saying, "Object to the truck, object to the car," and were

whispering with the Judge. After reviewing my trial notes, it became clear to me that nothing about the cattle and the car or truck came into evidence after this conference. The next morning, I waited until the Jury was in the jury room and I asked the Judge if I could put one more thing in the record and he agreed. I then explained part of what my client had told me and I put her back on the stand under oath and she told them exactly what she had told me. Mr Pinkert was not in court this day, but Mr. Deadman stood up and confirmed that the three of them had been talking [in] the outer office but that it was about an old trial they all had been in. When the jury returned its verdict it was as follows:

> Question 1: At and just before the accident was Esther Neuville negligent?
>
> Answer Yes
>
> Question 2: If you have answered Question 1 "yes," then answer this question: Was such negligence a cause of the injuries to Thomas Pichette, Jr.?

Answer No

Question 3: At and just before the accident was Thomas Pichette, Jr., negligent?

Answer No

Question 4: If you have answered Question 3 "yes," then answer this question: Was such negligence a cause of the injuries to Thomas Pichette, Jr.?

Answer

Exhibit 17.

In the Pichette case I had put in my list of experts, however I stated that I was attempting to locate a veterinarian to oppose their Dr. Jones. I finally found one and the Judge refused to let him testify on direct or on rebuttal. Exhibit 18.

I apologize for not having the transcripts for this portion of my complaint. I have been trying to get them for more than 3 weeks and I still do not have them. I enclose the letters in which I ordered the Pre-Trial and the portion of the trial having

to do with the ex-parte discussion. Exhibit 19A and 19B.

After reviewing my notes and talking to an attorney who does Federal litigation, it is clear to me that the Judge and the two attorneys involved may fall under the Federal Civil or Criminal RICO Conspiracy Act. I am wondering if you will report this to the Federal Prosecutor or should I report it under separate cover?

Since there are two attorneys involved in this matter, will you report them to the Board of Professional Responsibility, or is that my client's responsibility?

I have presented all the above situations as best as I recollect them. The transcripts, pleadings and documents will explain where I have not done so. Even so, I apologize for the length of this letter. I welcome you to review any other files you think might be important. I felt under the Ethical Mandates, and on behalf of my

clients, that I was required to report this situation.

Sincerely,

/s Challoner Morse McBride

CMM:btr

Enclosures